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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1314

WILLIS W. RITTER,

Petitioner,

v.

ROGERS C. B. MORTON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-1770

WILLIS W .RITTER,

Petitioner,

v.

ROGERS C. B. MORTON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 4, 1975.

CITATION TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit printed in Appendix "A" hereto, infra, pp. 1a-20a, is reported in 513 F.2d 942. The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for Idaho printed in Appendix "B" hereto, infra, pp. 1b-7b, is unreported. The Decisions of the Department of the Interior dated November 14, 1960, August 7, 1961 and April 2, 1963 are printed in Appendices "C", "D" and "E" hereto, infra, pp. 1c-5c, pp. 1d-5d and pp. 1e-7e, respectively.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on April 4, 1975. Petition for Rehearing was filed on April 18, 1975. The Order denying the Petition for Rehearing was entered on June 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the District Court was based upon the Constitution of the United States, particularly the Fifth Amendment, and the Administrative Procedure Act, Section 701 through 706 of Title 5, U.S.C. Jurisdiction is also founded upon Sections 2201 and 2202 of Title 28, U.S.C. Section 1331 of Title 28, U.S.C., and Section 1361 of Title 28 U.S.C. This action also arises under the Color of Title Act, 43 U.S.C. Section 1068.

QUESTIONS PRESENTED

(1) Should the Court of Appeals for the Ninth Circuit be reversed for applying a new "special circumstances" rule to hold that the traverse lines of a navigable river is a strict boundary of a subdivision conveyed by patent from the United States and for refusing to follow the accepted rule of law that the boundary of a fractional section is the water course of a navigable river and not the surveyor's meander line of the sinuosities of the bank of the river, with the result that the new rule will promote uncertainty, controversy, vexatious litigation and wholesale disruption of land titles.

(2) Should the Court of Appeal's decision be reversed for refusing to follow statutory law and *Railroad v. Schurmeir*, 74 U.S. 272 (1868), which provide that the boundary lines of a lot made fractional by a navigable river must run to the "water course" of the river as the external boundary of such fractional subdivision in the absence of a gross error or fraud against the United States by the surveyor.

(a) In view of the fact that the plat in the instant case which was incorporated by reference into the patent and showed to a demonstration that the meander line represented the border of the river and the record courses and distances were in substantial agreement with the existing bank of the river, should the Ninth Circuit decision be reversed on the ground that the Court refused to follow the rule of *Railroad Co. v. Schurmeir*, 74 U.S. 272, 287:

> *. . . In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a dem-*

onstration that the water course, and not the meander line as actually run on the land, is the boundary. (emphasis added)

(3) Should the Ninth Circuit's one-line ruling stating simply that "The decision of the Secretary of Interior under the Color of Title Act is affirmed" be reversed and set aside because the district court reserved ruling on that Count of the Complaint, made no findings or conclusions or judgment on this issue, and the issue was not briefed or argued before the Court of Appeals, thereby denying petitioner the judicial review to which he is entitled under the Administrative Procedure Act.

STATUTES INVOLVED

Section 2 of the Act of 1805, 2 Stat. 313, 43 U.S.C. 752 provides in pertinent part: (Appendix "F" hereto)

> The boundaries and contents of the several sections, half-sections, and quarter sections of the public lands shall be ascertained in conformity with the following principles:
>
> • • •
>
> Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended . . . And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed,

> the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the *watercourse*, Indian boundary line, or other external boundary of such fractional township (emphasis added).
>
> • • •

The Color of Title Act is contained in Appendix "G", hereto.

STATEMENT OF FACTS

The dispute in this case concerns the validity of a claim by the United States pursuant to a resurvey of the Snake River area in Idaho in 1955 to title to land designated Lots 9, 10 and 11, containing 8.99, 1.29 and .84 acres respectively (hereafter "disputed lands"). The owners of the riparian uplands of the disputed lands have continuously claimed title to these lands since 1896 when a patent conveying the adjacent upland Lots 5 and 8 was issued. The riparian owners of disputed Lot 9 (the largest) have used it for agricultural purposes since about 1910 when some of the heavy willows covering the land had been partially grubbed out and upriver dams along the Snake commenced controlling spring runoff that partially flooded these lands. The circumference of Lot 9 is still covered by dense willows and the use of Lot 9 has been exclusive to the owners of upland Lots 5 and 8 since that time (Fdg. 5. App. B., p. 5b). Lots 10 and 11 have no commercial value and are covered by thickets of willows.

Pursuant to the 1955 resurvey, the United States now claims not only petitioner's Lots 9, 10 and 11 but

approximately 16,000 additional acres along the Snake River, much of which has been conveyed previously by the government.

Petitioner, in this case, Judge Willis W. Ritter, owns "Thousand Springs Farm" which extends 3 miles along the Snake, a navigable river. The farm includes the upland fractional Lots 5 and 8. Petitioner's title to the disputed lands, Lots 9, 10 and 11, is derived from a record chain of title originating with a patent granted in 1896 which expressly conveys Lots 5 and 8 containing 16.8 and 33.6 acres respectively. An additional 120 acres was included in the remainder of the patent description.

These upland lots are made fractional by the Snake River. They are separated from the disputed lands by a small channel of water fed primarily from a stream, Sand Springs Creek, originating on the upland lots which flows into the Snake. Disputed Lots 9, 10 and 11 once formed a peninsula that has been partially dissected from the mainland by the action of Sand Springs Creek (Fdgs. 6 and 7, App. B., pp. 5b and 6b). The neck of land between the mainland and disputed Lots 9 and 11 has been cut in several places by shallow, willow-clogged channels containing water sometimes no more than ankle depth (Tr. 407), and at times almost dry (Tr. 406).

In 1893, the United States surveyed Township 8 South, Range 14 East of the Boise Meridian, and the plat of survey was approved May 18, 1895. Lots 5 and

8 of Section 17 are described therein, and the patent granting Lots 5 and 8 states that the conveyance is "*according to the Official Plat of the Survey of Said Lands. . .*" (emphasis added). The official plat shows to a demonstration that Lots 5 and 8 border on the Snake River. The surveyor's field notes mention that in coming to the point where the partially dissected peninsula exited the upland, that he was into a dense undergrowth of willows (Tr. 184). The notes recite: ". . . at 2.00 chains Sand Creek 1.00 chain wide. And center dense undergrowth of willows. At 11.00 chains Falls of Sand Creek bears S 53° 15 E about 8 chains distant. . . . at 3.50 cross another branch of Sand Creek 1.00 chain wide course west. . . ." At the time of survey these lots were mud flats, thickly covered with willows so dense as to make it impractical to survey them (Tr. 188). The disputed lands were subject to periodic flooding and indeed were created by sediments deposited when the Snake River overflowed its banks during flood stages (Fdg. 6, App. B, p. 5b). They were not fit for commercial or agricultural use at the time of the survey. The disputed lands have not been flooded since approximately 1912 when a series of upriver dams began to control the flood waters of the Snake River (Tr. 196, 197).

The 1893 surveyor's field records returned to the State Field Office purported to encompass all of the lands in the subdivision. On August 29th, 30th, 31st and September 1st and 2nd, 1893, assigned U.S. Deputy Surveyors and a support team of chainmen and axemen surveyed the west half of Township 8 South, Range

14 East. They surveyed all section lines in the township that crossed the Snake River and placed meander corners at each side of the river. The group then started at set meander corners on the south line of the township and moved north along the river bank with a series of chords. The recorded notes included references to unusual specific objects encountered such as:

> "Across sand bar"
>
> "Opposite of island [upstream from the disputed lands] in river
>
> Several references to abandoned placer works
>
> "Sand Creek Falls bears . . ."
>
> "At end of bluff"
>
> "To a rocky point"

These recordings indicate the detailed records kept in accordance with their oath: "That we will report the true distance to all notable objects."

Undisputed expert testimony at trial described the course of the surveyor in meandering the sinuousities of the banks of the Snake, (Gov't. Br., Ct. of Appeals, p. 15):

> My opinion was that the surveyor was a good surveyor and he was doing a good job, a commendable job, and what he saw to the left of the meander line (i.e. where the disputed lands were located) that he was establishing was *a bunch of willows, a mud flat.* . . . (emphasis added). (Tr. 188).

Because of the nature of this terrain, the surveyor, according to good practice, ran his traverse lines to the *east* or upland side of the disputed lands.

The testimony of Government witnesses was that the disputed narrow channel cutting the neck of the peninsula and thereby partially separating Lots 9, 10 and 11 from Lots 5 and 8 was 4 to 8 feet wide (Strickland Tr. 381) but that the channel widened to the north along the main confluence of Sand Springs Creek and the Snake, being up to 25 feet wide (LaMoyne Tr. 380). The depth of the water in the slough or channel between the disputed lands and the upland lots at the neck of the "peninsula" was "ankle deep" (Tr. 407), and in some years the channel was "almost dry" (Kelly Tr. 406), and the water "hardly moving" (Halverson Tr. 423). On the downstream side, which carried the bulk of Sand Springs Creek water, the depth went to as much as 6 feet deep (id.), where Sand Springs Creek cut a channel between Lot 9 and the upland lots and flowed downstream into the Snake. The main channel of the Snake which is to the west of the disputed lands runs between 10 and 35 feet deep (Eardley Tr. 179). The water course and the high and low water marks of the Snake are on the riverside (west side) of the subject lands (Fdg. 8, App. B, p. 6b and Concl. of Law 3, App B, p. 7b)

The Department of the Interior gave petitioner a notice of eviction in July, 1970. On June 24, 1959 plaintiff filed his Color of Title Application pursuant to the provisions of 43 U.S.C. 1068; it was rejected by the Bureau of Land Management; and the rejection affirmed by the Secretary of Interior in 1963.

The district court reviewed the nature of petitioner's action as follows:

> "In Count I of his complaint, plaintiff seeks by review of agency action to have the Court determine that the plaintiff was the owner of the property involved under the provisions of the Color of Title Act. The second and third Counts seek to restrain the Secretary and his agents from interfering with the plaintiff's title and possession of the lands which title is being claimed by way of patent from the United States of America, and mesne conveyances of the plaintiff." (App. B, p. 3b-4b)[1]

The district court ruled that the petitioner held title to the disputed lands "by way of the patent from the United States" (Concl. Law 3, App. B., p. 7b). The court in its Findings of Fact and Conclusions of Law held: (1) The channel of the Snake River in 1893, its "water course" and its high and low water marks were to the *west* of the disputed lands and not between them and the upland lots (Fdg. 8, p. 6b and Concl. of Law 3, p. 7b App. B); (2) The meander line of the Snake River in 1893, at the time of the survey of Lots 5 and 8 was on the west of the disputed lands thereby including them on the upland side (Fdg. 8, App. B., p. 6b); (3) There was no gross error or fraud in connection with the 1893 survey (Fdg. 9, App. B, p. 6b); (4) Petitioner and his predecessor owners of Lots 5 and 8 have had exclusive use of the disputed lands since 1896

[1] Jurisdiction of the Color of Title claim was founded upon the Administrative Procedure Act.

(Fdg. 5, App. B, p. 5b); and (5) The disputed lands constitute part of the "flood plain" of the Snake which had been partially cut away from the mainland, by the waters flowing from the "copious springs" thereby partially dissecting them from the mainland (Fdg. 6, App. B, p. 5b). The district court stated (id.):

> The subject lands . . . constitute a flood plain of the Snake River which plain was built during flood stages by the deposit of layer upon layer of silt and very fine sand which are the common sediments that the Snake River has carried . . . [*The*] *channels cutting across Lots 5 and 8 resulted from the copious springs flowing from the adjacent basalt cliffs which have converged into waterways across the flood plain and the flood plain has been cut in such a manner that certain remnants such as the subject property have been partially dissected from the mainland.* (emphasis added).

Consistent with these findings, the official plat rendered in 1895 shows the western boundaries of Lots 5 and 8 to the Snake. The plat shows no traverse lines on the west of Lots 5 and 8 inside the shore line of the Snake.

Because the district court held petitioner to have actual title, it did not rule on petitioner's appeal from the Department of the Interior's denial of his claim under the Color of Title Act.

The Court of Appeals for the Ninth Circuit reversed. That Court did not find any fraud or mistake in the survey, nor did it find the surveyor had not prop-

erly run his traverse lines along the sinuosities of the bank of the Snake according to good practice. Nor did the Court dispute the district court's findings that the water course and high water mark of the Snake were on the west of the disputed lands. Nevertheless, the Court adopted a new "special circumstances" rule of law to hold that the traverse lines describing the bank of the Snake constituted a strict boundary of upland Lots 5 and 8, and excluded the disputed lands.

The Court then held that the district court had committed "clear error" by placing the meander lines of the Snake on the *west* (riverside) of the disputed islands rather than the east (upland side). But it was conceded by both parties at trial that the surveyor's traverse lines were to the *east* of the islands. Clearly the district court's reference to the meander of the Snake was to the actual meander or water course of the river and not the traverse lines. (Fdg. 8, App. B, p. 6b). The district court made no finding as to the traverse lines, as that was not in issue. The Court of Appeal's finding of "clear error" was, therefore, gratuitous. In sum, the district court's conclusion that the *actual* meander (not the traverse lines) or water course of the river was to the *west* of the disputed lands (thereby including them) was not challenged by the Court of Appeals.

The "special circumstances" which the Court thought determinative included the fact that the patent

conveyed the exact number of acres in the upland lots,[2] that the plat did not include the islands since it showed the border of Lots 5 and 8 to be the "water's edge" (not the water course) (App. A, p. 14a); that the value of the land, its remoteness and difficulties in surveying should be considered; and the size and value of the terrain omitted should also be evaluated. (App. A, p. 11a). The Court then stated:

> It should be emphasized at this point that these are all merely *factors* to be considered in evaluating the weight to be given to the position of a meander line *vis-a-vis* the boundary. Factual circumstances differ from case to case, and *all* the facts must be considered individually and then considered *in their totality*. (App. A. p. 12a).

The court gave "great weight" to the fractional lots' boundary as shown in the survey and plat, and to the surveyor's omission of the disputed lands, which the Court conceded to be of "relative smallness." (App. A, p. 18a). Finally the Court noted that there were some settlers in the area but erroneously stated that the islands were "continuously used for agricultural purposes" since the time of survey.[3]

The Court of Appeals did not discuss applicability

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[2] The irrelevancy of this fact has been repeatedly established. See page 30 infra.

[3] The evidence was that the lands were partially cleared of dense willows in about 1910, and that some agricultural uses have been made of it since then (Tr. 47, 49, 53; Fdg. 5, App. B. p, 5b).

of the long-established general rule that in the absence of fraud or mistake, the water course of a river is the boundary of a fractional section, not the traverse lines. *Railroad Co. v. Schurmeir,* 74 U.S. (7 Wall.) 272 (1868).

Petitioner's claim under the Color of Title Act, was not briefed or argued by either party before the Court of Appeals, since the district court did not rule on it. The Court of Appeals summarily disposed of the issue in one sentence by simply stating that "[the] decision of the Secretary of the Interior is affirmed" (App. A, p. 20a).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals represents a most serious departure from the 1805 statute, which establishes the boundaries of subdivisions made fractional by navigable rivers, and from past decisions of this Court construing that statute. This body of law has imparted a high degree of certainty, predictability and stability to titles to land lying along navigable rivers. Unless reversed, the Ninth Circuit's decision will, as a practical matter and as a matter of fundamental fairness have extraordinarily wide, adverse ramifications.

Within the jurisdiction of the Ninth Circuit, lie a number of the country's navigable rivers. Along the Snake alone, there are some 500 property owners who are affected by Government resurveys of their riverfront property. *Hearings on S. 216 Subcommittee on Public Lands, Senate Committee on Interior and Insular Affairs,* 92nd Cong. 1st Sess. p. 49 (1971).

Under the Omitted Land Act of 1962, the Department of Interior has claimed title to some 16,000 acres along approximately 150 miles of the Snake River pursuant to resurveys. The Department of the Interior in a Memorandum dated May 7, 1975, making specific reference to the decision of the Court of Appeals in this case, states that "when the resurveys were completed and omitted land areas identified, approximately 400 parties were notified by the Bureau that omitted lands fronted their lands along the Snake River." The Memorandum further states that the "lands typically lie between the actual water course of a body of water, and the original surveyed meander lines."[4] The Department of the Interior has made clear its intention to dispossess the above-mentioned 400 persons of 16,000 acres on the basis of the circuit court's decision.

In addition, the decision of the Court of Appeals in an important area of public land law has abandoned heretofore settled principles in favor of ad hoc judicial determinations. The Court of Appeals made clear that no particular factor in its "special circumstances" test controls whether the meander (traverse) lines or the statutory "water course" should be held to be a boundary. Stability and predictability of the validity of land titles are utterly impossible when, as the circuit court held, "the facts must be considered individually and then considered in their totality" (App. A. p. 12a). In short, the effect of the Ninth Circuit's rule is to promote litigation and to cause the government to challenge

[4] The above mentioned Memorandum is reproduced in App. H.

hundreds of land titles that have been settled and relied upon for decades in accordance with heretofore settled rules of law.

The decision of the Court of Appeals accomplishes precisely what this Court held to be intolerable with respect to the stability of grants by the United States. In *Mitchell v. Smale*, 140 U.S. 406, 412-413 (1891), the Court stated:

> We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not be created or sanctioned.

POINT I

THE CIRCUIT COURT ERRED IN FAILING TO APPLY THE DOCTRINE IN RAILROAD CO. v. SCHURMEIR THAT IN THE ABSENCE OF FRAUD OR MISTAKE THE WATER COURSE OF A RIVER IS THE BOUNDARY OF A FRACTIONAL SECTION

WHEN IT IS SHOWN ON THE OFFICIAL PLAT THAT IT BORDERS ON THE RIVER

Section 2 of the Act of February 11, 1805, 2 Stat. 313, 43 U.S.C. 752 is the basic statute designating the manner in which fractional lots must be surveyed and how the boundaries of such lots must be established. That statute specifically states the boundaries of sections bordering on navigable streams must be the "water course" of the river.

Railroad Co. v. Schurmeir, 74 U.S. 272 (1868) applied that statute on facts closely parallel to the facts of the instant case. That case squarely supports the decision of the district court; it is flatly at odds with the decision of the circuit court below, which was rendered on a theory not even argued by the government and which initiated a new approach to fractional subdivision boundary questions. For practical purposes, the Court of Appeals ignored the *Schurmeir* doctrine which has been the leading authority in cases such as this since 1868.

A. *The Official Plat Includes The Disputed Lands In The Boundary of Lots 5 and 8 Under the Rule of Schurmeir.*

The official plat describing fractional Lots 5 and 8 shows them bordered by the Snake River. The law is clear that the water course of the Snake is, therefore, the boundary of Lots 5 and 8 since the water course is defined by the high water mark of the river, *Shively*

v. Bowlby, 152 U.S. 1; *United States v. Ashton*, 170 Fed. 509 (C.A. 9 1909) (appeal dismissed), and since the high water mark was on the west of the disputed lands, the boundary of Lots 5 and 8 includes as a matter of law the disputed Lots 9, 10 and 11.

As stated in *Mitchell v. Smale*, 140 U.S. 406, 413 (1891) in language precisely on point here: "The official plat made from such survey does not show the meander line" but shows the body of water making the lots which border thereon fractional. The patents referring to such plat for identification of the lots conveyed "have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, *as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed . . .*" (emphasis added)

The same principle was stated in *Schurmeir*, 74 U.S. at 287:

> In preparing the official plat from the field-notes, the meander line is represented as the border-line of the stream, and shows, to a demonstration, that the water-course, and not the meander-line, as actually run on the land, is the boundary.

See also *Hardin v. Jordan*, 140 U.S. 371, 381 (1891).

The plat in *Schurmeir* showed the section lines running to the Mississippi just as they run to the Snake in this case. The island lying offshore in *Schurmeir* was not platted, but the Court sustained the finding

that ". . . the plat, as recorded, describes the land as extending to the *main channel* of the river" (74 U.S. at 283) (emphasis added). See also *Smith v. Long*, 281 P.2d 483, 491 (Idaho 1955); *Younie v. Sheek*, 260 Pac. 419 (Idaho 1927) to the effect that the "water course" of the Snake means a main channel and not an insignificant channel. Thus *Schurmeir* held that an insignificant side channel did not constitute the "water course" or the statutory boundary, and, the small channel between the disputed lands in this case and the upland lots does not constitute the boundary of Lots 5 and 8. Rather, that boundary includes the disputed lands whose western boundary constitutes the *water course* and the high water mark of the Snake (Fdg. 8 and Concl. of Law 3, App. B, pp. 6b and 7b). The conclusion that the circuit court below erred is buttressed by the fact that the side channel was cut by Sand Springs Creek, and not the Snake and only partially dissected the disputed lands from the mainland (Fdg. 7, App. B, p. 6b).

B. *Schurmeir is Controlling on the Facts and the Law.*

There are additional similarities between *Schurmeir* and the case at bar as shown in the following comparison with this Court's opinion in that case.

(1) *The Disputed Lands Were Located in Sections Made Fractional by Navigable Rivers. The Plats of the Lands Covered by the Patents Represented the Navigable Rivers as Boundaries on One Side.*

(a) *Schurmeir*: "This fractional section . . . was represented by the plat thereof, as bounded on the north by the east and west sectional line, on the west by the north and south sectional line, and on the only other remaining side by the Mississippi River. It was this river that interposed and made this section a fractional one" (p. 275).

(b) *Ritter*: This fractional section was designated by the *survey* as Lots 5 and 8, Section 17 and was *represented by the Plat* thereof, as bounded on the South by a section line running East and West between Sections 17 and 20; *on the West by the Snake Rvier*; on the North by half section line running East and West through the center of Section 17; on the East by the main rock wall. It was the Snake River that interposed and made this section a fractional one.

(2) *In the Government Surveys no Mention was Made of the Disputed Lands in the Field Notes or in the Plats.*

(a) *Schurmeir*: In the government survey, no mention was made of this bar or island [the disputed land], in the field notes, plat or map. The fractional parcel . . . was represented as lying immediately upon, and bounded by, the Mississippi River (p. 276).

(b) *Ritter*: In the government survey, no mention was made of the so-called "islands," in the field notes, plat or map. The fractional parcel was represented as

lying immediately upon, and bounded by, the Snake River.

(3) *The Surveyors, in Meandering the Course of the Rivers along the Fractions, Ran the "Meander Lines" Along the Mainland of the Shore, and Did Not Include the Space Occupied by the Disputed Lands in the Estimate of the Quantity of Land Contained in the Fraction.*

(a) *Schurmeir*: "The surveyor . . . in meandering the course of the river along the fraction, ran the 'meander-lines' along the mainland of the shore, and not along the . . . bar or island, and thus did not include the space occupied by this depression, and bar or island, in his estimate of the quantity of land contained in the fraction" (p. 276).

(b) *Ritter*: The surveyor in meandering the course of the river along the fraction, ran the "meander lines" along the mainland of the shore, and not along the westerly line of these "islands" and thus did not include the space occupied by the slough or "islands," in his estimate of the quantity of land contained in the fraction.

(4) *The Patent from the United States Described the Fractional Sections as Containing so Many Acres "According to the Official Plat of the Survey," and "Presented the River as the Boundary."*

(a) *Schurmeir*: "[T]he patent (described) the lot . . . as containing so many acres, 'according to the official plat of the survey,' a plat which . . . did not represent the bar or island, in any way, nor the channel or slough between, but presented the river as the boundary . . ." (p. 277).

(b) *Ritter*: The 1896 patent described Lots 5 and 8, and other adjoining lands in Section 17, as containing one hundred and seventy acres and forty-hundredths of an acre, "according to the Official Plat of Survey of the said land, returned to the General Land Office by the Surveyor General," a plat which did not present the "islands," in any way, nor the channel or slough between, but presented the river as the boundary.

(5) *No Gross Error or Fraud was Claimed in Either Case.*

(6) *The United States Did Not Expressly Reserve the Disputed Lands in Either Case.*

Other compelling similiarities in the underlying facts of the *Schurmeir* and *Ritter* cases are that in both cases the disputed lands were low-lying, subject to flooding, and not encompassed by the water course of the navigable rivers. The size of the disputed lands were relatively small (*Ritter*-8.99, 1.29 and .84 acres; *Schurmeir*-2.78 acres), as was the percentage of the disputed lands to the undisputed lands covered by the patent (*Ritter*-6%; *Schurmeir*-30%). The width of the channel which separated the disputed lands from

the upland was narrow (*Ritter*-approximately 4 to 8 feet at the narrowest; *Schurmeir*-28 feet), and the said small channel was shallow (*Ritter*-ankle-deep; *Schurmeir-shallow*). The disputed lands were nearly connected to the upland (*Ritter*-almost dry—once a peninsula — imperceptible rate of flow in small channel; *Schurmeir*-connected in low water.) The surveys in both cases occurred at a period in history when population densities and economic values were low. In Ritter, the population of the entire township was 16 persons, with "one settler in Section 17" (Plf. Ex. 6, Tr. 35).

On these facts and the 1805 statute, the Supreme Court in *Schurmeir* held that the island in the river had been conveyed, and affirmed the Supreme Court of Minnesota. This Court relied upon a well-established rule that should govern this case and which is irreconcilable with the decision of the circuit court. This Court held (74 U.S. at 287):

> In preparing the official plat from the field-notes, the meander-line is represented as the border-line of the stream, and shows, to a demonstration, that the *water course*, and not the meander-line, as actually run on the lands, *is the boundary*" (*Schurmeir* at p. 287, (emphasis added).

We submit that the circuit court's decision erroneously forsook an analysis based upon the general principles stated in *Schurmeir* for a proposition which makes land titles turn upon the subjective judgments of courts in evaluating a myriad of factors whose pertin-

ence cannot be fully known without a court adjudication.

POINT II

THE COURT OF APPEALS ERRED IN HOLDING AN AD HOC EVALUATION OF "SPECIAL CIRCUMSTANCES" SHOULD BE EMPLOYED TO DETERMINE A BOUNDARY.

This Court has adhered strictly to the principle that the "water course" of a river is the boundary of a section fractionalized by a navigable river, even though the surveyor's traverse lines do not correspond exactly to the actual water course of the river as long as the meander lines describe the sinuosities of the bank of the river. *Hardin v. Jordan*, 140 U.S. 371 (1891); *Mitchell v. Smale*, 140 U.S. 406 (1891); *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890); *St. Paul & Pac. R.R. Co. v. Schurmeir*, 74 U.S. 272 (1868).

This general rule is subject to two specific, narrowly defined exceptions: (1) there must have been no fraud, and (2) no gross mistake.

Stability of land titles requires that the United States prove an exception to the general rule by compelling evidence. Thus, there must be some extraordinary proof of mistake by the surveyor, *Hardin v. Jordan*, 140 U.S. 37 (1891); or evidence that "conclusively show[s]" that no water existed at or near the place indicated on that plat, *Jeemes Bayou v. United*

States, 260 U.S. 561 (1923). Moreover, these exceptions are to be applied with great caution and narrowly limited to situations where the error in the survey is substantial, wholly unexplainable, and evidences fraud. *United States v. Zager*, 338 F. Supp. 984 (E.D. Wis. 1972); *United States v.* 295.90 *Acres of Land*, 368 F. Supp. 1301 (M.D. Fla. 1974).

Of course if the surveyor's suppositious "meander lines" do not in fact describe the sinuosities of the banks of the water course of a river or other body of water, and are run by courses and distances, then the traverse lines constitute the boundary to the adjoining lot and not some body of water in the neighborhood. *Jeemes Bayou Fishing & Hunting Club v. United States*, 260 U.S. 561 (1923); *Producers Oil Co. v. Hanzen*, 238 U.S. 325 (1915); *Horne v. Smith*, 159 U.S. 40 (1895).

Since meander lines can only approximate the actual water course of a river, all surveys necessarily contain omissions of small areas between the meander lines and the actual water course, *Schurmeir*, *supra* at p. 286-87.

Such areas, although not included in the specific conveyance described in the patent, are conveyed as a matter of law. *Mitchell v. Smale, supra; Gauthier v. Morrison*, 232 U.S. 452, 459 (1914); *United States v. Lane*, 260 U.S. 662, 664 (1923); *Railroad Co. v. Schurmeir, supra.*

In the instant case the circuit court invoked none of the accepted exceptions to avoid the general rule. In-

deed, the Court of Appeals affirmed the district court's findings that there had been no fraud or such gross error to constitute fraud on the government. Nor did the Court of Appeals contend that the surveyor had not actually surveyed the sinuosities of the bank.

Instead, the circuit court held that "special circumstances" made inapplicable the general rule that meander lines are not actual boundary lines (App. A, p. 20a). The court of appeals held that no single factor and no aggregation of factors would necessarily be determinative "in evaluating the weight to be given to the position of a meander line *vis a vis* the boundary . . . [and that] *all* the facts must be considered individually, and then considered *in their totality*" (App. A, p. 12a) In short, each case involving the boundaries of land bordering on a navigable river will be decided on an ad hoc basis according to an unpredictable permutation of circumstances unique to the particular case.

The circuit court relied upon the following language in *Producers Oil Co. v. Hanzen* that "facts and circumstances" may "affirmatively disclose an intention to limit the grant to actual traverse lines" so that they are treated as actual boundaries (238 U.S. at 339). But this relates only to cases, as in *Producers Oil*, where the traverse lines do not purport to meander a river and where the river is not treated as a natural monument. This Court made that point explicit in *Producers Oil*, (238 U.S. at 337):

> The meander line established by Bristol on the east and northeast of Lot No. 1 does not meet any of the requirements set forth by the Supreme Court of the United States in defining a meander line in *Railroad Co. v. Schurmeir*, 7 Wall, 272, 286 . . . [T]*he Bristol meander lines does not purport to define the sinuosities of a stream; it is not represented as the border line of a stream; . . . and it shows, to a demonstration, that the meander line, as actually run on the land on the east and northeast of lot No. 1, is the boundary, and that a water course is not the boundary . . .* [emphasis added]

The Court of Appeals also relied on *United States v. Lane*, 260 U.S. 662 (1923); *Jeemes Bayou Club v. United States*, 260 U.S. 561 (1923); and *Niles v. Cedar Point Club*, 175 U.S. 300 (1899). None of these cases support the circuit court. Although *Jeemes Bayou* and *Niles* held that the so-called meander line was a strict boundary, there was compelling evidence in each case of gross error, fraud, or that the surveyor was not meandering the sinuosities of a body of water. The *Lane* case squarely supports the petitioner's position.

Jeemes Bayou involved a claim of title to 500 acres of heavily timbered upland which lay between a body of water and a 48-acre lot that had been surveyed and conveyed. The owner of the latter lot claimed the 500 acres on the basis of *Schurmeir*. The surveyor's field notes showed no intention to meander any body of water and described the boundaries of the 48 acres by courses and distances.

This Court held that the "omission [of the contested lands] was of deliberate purpose, or the result of such

gross and palpable error as to constitute in effect a fraud upon the government" (260 U.S. at 564). Nothing in the Court's decision indicates that when a meander line follows the sinuosities of the bank of a navigable river with substantial accuracy, and the call on the official plat is to a navigable river, that a court may depart from the statutory prescription that the water course is the actual boundary. *Niles v. Cedar Point Club*, 175 U.S. 300 (1899) is likewise not in point since the meander line did not purport to define the sinuosities of the bank of a body of water.

Nor does *United States v. Lane, supra*, stand for the proposition that "special circumstances" may be relied upon as an additional exception to the general rule. Indeed the Supreme Court applied the general rule of *Schurmeir* and refused to apply the gross error or fraud exception of *Jeemes Bayou*. The Court in *Lane* found that the surveyor had in fact meandered the sinuosities of the bank of the river and held the *water course* to be the boundary. The disputed lands lying outside the meander line consisted of 5.67 acres (with 26.8 acres in the fractional subdivision); 12.72 acres (with 23 acres in the fractional subdivision); and 27.87 acres (with 155 acres in the fractional subdivision). Consistent with *United States v. Chandler-Dunbar Co.*, 209 U.S. 447 (1908), the Court held these omitted fragments conveyed by a patent describing the fractional, upland subdivisions, despite the fact that the exact acreage in those fractional lots was specified as the amount of land conveyed. This Court in *Lane* mentioned the value of the lands surveyed, their locality,

wildness, remoteness and attendant difficulties in surveying simply as *an explanation* of why, as a practical matter, a surveyor would run the meander lines of a body of water at some distance from the water's edge, but the Court did not indicate that such circumstances by themselves constituted the basis of a legal "special circumstances" rule, that could be used to overcome the principle that the *water course is the boundary and not the meander lines.* Obviously such "special circumstances" are relevant to issues of gross error or fraud, but there is no hint of such issues in the instant case.

Finally, *Scott v. Lattig*, 227 U.S. 229 (1913), heavily relied upon by the court of appeals, deals with an entirely different concept. The issue was whether owners of lots bordering on the Snake held title to a hard, fast island *located in the Snake across a broad main channel of the Snake 300 feet from one shore and 1,000 feet from the other on the theory of riparian rights.* The island was beyond question far outside the meander lines of the upland lots and also outside and far beyond the banks of the channels of the Snake. The island was unsurveyed at the time of statehood, and the Court held that title had not passed from the United States. No serious question of the applicability of the doctrine of *Railroad Co. v. Schurmeir* was ever raised, as it obviously had no applicability.

The survey in the instant case followed the water course of the Snake far more closely than in *Lane* and was clearly intended to include all land to the *water course of the main channel of the Snake.* The official

plat, which the patent expressly incorporated, in fact shows lots 5 and 8 bordering on the Snake. The disputed lands in this case were not surveyed for the same reason the disputed lands in *Lane* were not surveyed. The uncontradicted testimony at trial (relied upon by the government in its brief below) was (Tr. 188):

> My opinion was that the surveyor was a good surveyor and he was doing a good job, a commendable job, and what he saw to the left of the meander line that he was establishing was a bunch of willows, a mud flat [i.e., the islands in dispute].

The Court of Appeals in applying its "special circumstances" rule looked to facts which neither separately nor in their totality evidence fraud or gross error. First, the Court of Appeals looked to the bulbous nature of the river as shown on the plat at the point where the disputed lands were located; but this was to be expected, since the low-lying, willow covered peninsula (Lots 9, 10 and 11) was there as were the waters of Sand Springs Creek. That Court also relied upon the fact that the patent contained an *exact* number of acres and therefore should be limited to that acreage. But this Court and others have held that fact irrelevant in applying the rule that the water course, not the meander lines, is the boundary. *United States v. Lane*, 260 U.S. 662 (1927); *Whitaker v. McBride*, 197 U.S. 510 (1904); *Hardin v. Jordan*, 140 U.S. 371 (1891); *Internal Improvement Fund v. Novak*, 401 F.2d 708 (C.A. 5, 1968).

Moreover the patent in *Schurmeir* also referred to an exact number of acres.

In both *Schurmeir* and *Ritter* the disputed lands were not included in the estimate of the quantity of land contained in the fraction. (See pages ~~21~~-22 of this petition)

The circuit court also said the surveyor mentioned in the survey notes an island upstream from the disputed lands. From this the court speculated that the surveyor must have intended to return and survey the disputed lands. This speculative proposition points up the danger of the "special circumstances" rule. The evidence doesn't show the nature of the upstream island, how high it was above the water of the river, or any of its other characteristics. Mention of the upstream island demonstrates that the surveyor was following his instructions in reporting "all notable objects" and suggests that the willow clogged disputed lands were not "notable".

Surveyors were instructed regarding surveying islands that every island above the mean high-water elevation of any meanderable body of water will be definitely located by triangulation or direction measurement or "*other suitable process*" and will be meandered and shown upon the official plat. Of these three options the surveyor adopted the third and least accurate and estimated the size and distance of the island located in Section 20, while he was at the site. If the surveyor

had determined the disputed land to be islands, he probably would have utilized the techniques previously adopted in Section 20 with respect to islands located there and *estimated* size and distance *while he was at the site.*

The inference relied upon by the Court of Appeals that the surveyor intended to return to survey the disputed lands was expressly rejected in *Grand Rapids and Indiana R. R. Co. v. Butler*, 159 U.S. 87, 91-92 (1894).

Finally, the Court of Appeals references to the 1959 plat (Diagram "B" appended to its decision) and the so-called "Plat Current to 1971" (Diagram "C" appended to its decision) are totally misleading. Diagram "C" was represented by the circuit court as "the most recent plat of the lands in question". Diagram "C" is *not* a plat. The record shows that it was not received as a plat, but for a limited purpose only. *It was not received* to show the relation of the disputed lands to the river, for the reason that the relationships are highly distorted. This document was received only to show the relative acreage of the disputed lands to Lots 5 and 8 (Tr. pp. 301, 309, 312).

Diagram "B" is also highly misleading since the concepts portrayed create erroneous impressions as to the width of channels and the size and nature of lands in relation thereto in 1955 as compared to 1893. This platting procedure in its very nature is not designed to show true conditions, nature of channels, nature of

banks of the stream, extent to which there is an overgrowth of willows, the depth of the channels, etc. — and the conditions are not static. Reliance upon these diagrams in the fashion of the circuit court is to ignore all of the reliable evidence in support of the district court's findings. (For eg. see Plf. Exs. 49 and 50, Tr. 171; and Plf. Ex. 51, Tr. 191).

In addition, the construction of a number of dams and irrigation projects on the Snake subsequent to the 1893 survey contributes to the gross distortion of Diagrams "B" and "C" by making the channels between the upland lots and the disputed lands appear larger. In short the diagrams are inconsistent with the specific findings of the district court.

In sum, the objectives test of *Schurmeir* is abandoned for a subjective analysis of all surrounding circumstances in an attempt to determine what the surveyor intended. Only the imagination of government counsel would limit the totality of facts which the government could present to the trier of the fact to determine what the surveyor intended 80 years ago.

The Ninth Circuit decision makes new law. It sets aside an Act of Congress that has been on the books for 170 years. That court blue pencils it right out of the statutes at large. More than that, it overrules a decision of the Supreme Court of the United States which for

over 100 years has provided clear and definite instructions to surveyors of land bordered by navigable rivers.

Congress and the Supreme Court long ago set at rest the uncertainties concerning the survey of lots made fractional by a navigable river by providing that the boundaries run to the "water course" of the river on which they border. This is a part of the nation's rectangular survey system affecting lands that border navigable rivers, bayous, lakes *all over the United States.*

The vice of the Ninth Circuit decision if followed is that ownership of lands bordering on every navigable body of water in the United States will be in a state of confusion and uncertainty. At once it unsettles property rights on the borders of the Snake River from Jackson Hole, Wyoming, through Idaho, Oregon and Washington.

The resulting vexatious litigation will burden and clog the already heavy dockets of federal courts.

POINT III

THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE SECRETARY OF THE INTERIOR UNDER THE COLOR OF TITLE ACT AND THE MATTER SHOULD BE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS.

The pro forma affirmance of the decision of the

Secretary of the Interior on Count I of the complaint involving the Color of Title Act, without any independent judicial review clearly violates petitioner's rights to a judicial review of agency action under the Administrative Procedure Act.

The Color of Title Act issue was not passed on by the district court and was neither briefed nor argued in the court of appeals. The pro forma decision of the court of appeals affirming the Secretary did not constitute judicial review or an analysis of the applicable legal principles.

The issues reserved by the lower court involved substantial considerations relating to the vitality of the Color of Title Act.

The restrictive and limited interpretation placed upon the Color of Title Act by the Secretary severely frustrates the intent of Congress. The initial decision of the Land Office and the decision of the Acting Chief, Devision of Appeals in the initial appeal held that color of title must be founded upon an instrument in writing, and that no such instrument existed since the patents described only Lots 5 and 8 and other upland. There was no "deed or other instrument which purports to pass title and which appears to be title to the land . . ." (App. C, p. 4c; App. D, p. 3d).

On appeal the Secretary of the Interior ruled, in effect that a change in a state court law rejecting the view that actual title existed under the doctrine of ripar-

ian rights established that subsequent property owners could not possess the property in good faith to satisfy elements of the Color of Title Act (App. E, pp. 4e-5e).

As held in *Cameron v. United States*, 148 U.S. 301, 308 where a deed is fairly open to construction as to property covered by a survey, color of title exists. The Secretary of the Interior did not consider the law of *Schurmeir* as it affects Color of Title issues, apart from actual title. Nor did it consider federal law establishing that boundaries of a fractional subdivision extend to the water course when the boundary on a plat establishing such fractional subdivisions shows the river to be the boundary.

CONCLUSION

We respectfully submit that a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIS W. RITTER,

Appellee,

vs.

ROGERS C. B. MORTON, Secretary of the Department of the Interior, JOE T. FALLINI, Idaho State Director, Bureau of Land Management, and ORVAL G. HADLEY, Manager, Idaho Land Office, Bureau of Land Management,

Appellants.

[April 4, 1975]

Appeal from the United States District Court
District of Idaho

Before: DUNIWAY and KILKENNY, Circuit Judges, and SWEIGERT,* District Judge.

PER CURIAM:

This case involves the ownership of three islands

*The Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

located in the Snake River in Idaho. The action was brought by appellee, and jurisdiction was claimed under 5 U.S.C. §§ 701-706 (Administrative Procedure Act), 28 U.S.C. §§ 1361 (suit compelling officer to perform duty) and 2201, 2202 (declaratory judgment). After a full presentation of the evidence, the district court found for appellee. We reverse the judgment of the lower court and affirm the decision of the Secretary.

FACTS

Appellee is the owner of "Thousand Springs Farm," which extends for three miles along the east bank of the Snake River in Gooding County, Idaho. His ownership of the land results from a series of conveyances dating from the original government patents. The islands in dispute are in Section 17 of Township 8 South, Range 14 East of the Boise Meridian, and are located in the river immediately south and west of the principal area of appellee's farm.

The United States caused a survey of the township to be made in August and September of 1893. An official plat of the the township, based on the surveyor's field notes, was drawn and approved by the Surveyor General for Idaho in May, 1895. The relevant portion of this plat is shown in Diagram A. In February, 1896, a patent was issued under the Homestead Act to Polina Lewis, a predecessor in interest of appellee. The patent covered ". . . the Southeast Quarter of the Southeast Quarter and the West Half of the Southeast Quarter, and Lots Five and Eight in Section Seventeen, . . . containing 170.40 acres." According to the official plat,

fractional Lots 5 and 8 contained 16.80 and 33.60 acres respectively, with 120 acres in the remainder of the patented area. The lots bordered on the river.

The surveyor's field notes make no mention of the disputed islands which, in fact, were located alongside Lots 5 and 8. The surveyor's description of the river's meander line on the east bank specifically mentions crossing Sand Creek twice, thus apparently remaining east of the islands. The plat shows only a significant bulbous widening of the river where the islands in fact were located. This contrasts sharply with the survey and plat of Section 20 to the south, in which an island is described in the field notes and drawn in the plat. Another contrast is evident with Section 8 to the north, wherein the meander line clearly is shown to be on the west side of an island-like piece of land separated from the adjacent basalt cliffs by a stream created by the flow of Thousand Springs.

The Department of the Interior did not conduct a survey of the disputed islands until 1955. They were then designated Lots 9, 10 and 11 and measured 8.99, 1.29 and 0.84 acres, respectively. A plat based on the 1955 field notes was filed in 1959, the relevant portion of which is contained in Diagram B. The most recent plat, current to September, 1971, shows Lots 5 and 8 still to be 16.80 and 33.60 acres, respectively, as they were in the 1895 plat. The relevant portion of the latest plat is pictured in Diagram C.

In June, 1959, appellee was notified by the Department of the Interior that the previously omitted

islands are, by virtue of the new survey, ". . . public lands of the United States open to entry and selection under the public land laws. . . ." Other material facts follow.

PROCEEDINGS BELOW

When the Department later made known its intention to transfer title in the islands to the State of Idaho, appellee commenced an administrative action under the Color of Title Act, 43 U.S.C. §1068, which action was ultimately denied by the appellant Secretary of the Interior. This action in the district court followed. Appellee asked that the administrative action be reversed or that, alternatively, the appellant officers of the United States be restrained from interfering with his title, use, and possession of the claimed islands.

The district court made, *inter alia*, the following findings of fact:

—"The field notes and survey plat described the western boundary of Lots 5 and 8, Section 17, as the meander line of the Snake River."

—The disputed islands, according to expert testimony, ". . . constitute a flood plain of the Snake River which plain was built during flood stages by the deposit of layer upon layer of silt and very fine sand which are the common sediments that the Snake River has carried."

—"[T]he subject lands once formed a peninsula which was connected with the mainland, now Lots 5

and 8. The subsequent separation of the subject lands from Lots 5 and 8 was due to the flow of Sand Springs Creek and not the action of the Snake River."

—"The channel of the Snake River in 1893 was to the west of the subject lands and the high and low marks of the Snake River are to the west of the subject lands. *The meander line of the Snake River in* 1893, *at the time of the survey of Lots* 5 *and* 8 *was on the west boundary of the subject islands.*" [Emphasis supplied.]

—"There was no gross error or fraud in connection with the survey of 1893."

Among its conclusions of law, the district court held that the action was in the nature of one ". . . to restrain the defendants from interfering with the plaintiff's use and possession of lands patented and lawfully conveyed to him." Accordingly, it concluded that the action was not barred by the doctrine of sovereign immunity and that it had jurisdiction. It found appellee to be the owner of the islands because they ". . . are east of the water course of the Snake River which constitutes the actual boundary of the land conveyed by the patent. . . ." In finding for appellee and enjoining appellants from interference with the appellee's title to the islands, the court found it unnecessary to determine the administrative appeal under the Color of Title Act.

ISSUES ON APPEAL

The questions raised by the parties and presently before this court are:

1. Did the district court err in concluding that this action is not barred by the doctrine of sovereign immunity?

2. Is federal or Idaho law controlling on the boundary determination issue?

3. Did the district court apply the proper rules of law in determining the placement of the boundary and the ownership of the islands?

4. Was the district court clearly erroneous in its factual findings that the disputed islands were east of the Snake River's boundary and meander line?

THE SOVEREIGN IMMUNITY ISSUE

Though under attack in other areas of the law, the doctrine of sovereign immunity is still very much alive in suits involving land title disputes. An uncontested suite against a federal officer which is, in substance, a suit against the United States has traditionally been jurisdictionally barred by sovereign immunity. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949). The rule was restated and clarified in *Malone v. Bowdoin*, 369 U.S. 643 (1962), involving a common law ejectment action against an officer of the Forest Service to prevent him from occupying land under claim of title. Citing *Larson*, the Court in *Malone* stated:

> "[T]he action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise

> in the particular case, are constitutionally void.'" 369 U.S. at 647.

Here, appellee made affirmative allegations of illegal and unconstitutional conduct by appellant officers. However, the bare allegations cannot lift the jurisdictional bar if the action is, in actuality, one to quiet title against the United States.

We have applied *Malone* in two recent instances, *Andros v. Rupp*, 433 F.2d 70 (CA9 1970), and *Armstrong v. Udall*, 435 F.2d 38 (CA9 1970). *Andros* was an action against a U.S. forest supervisor to restrain him from interfering with plaintiff's use and possession of the land. The distinguishing feature for our purposes here, however, is that record title was stipulated as being vested by patent and mesne conveyances in the plaintiff, not the United States. In our case, there is no such agreement, and in fact, the title ownership is the sole point of dispute. Appellee's reliance on this case is misplaced.

Further clarification comes in *Armstrong v. Udall*, *supra*, an action to enjoin the Secretary of the Interior from claiming title to property held by plaintiff and originally entered by plaintiff's predecessor, and to require the Secretary to execute patents and titles to the land. Its similarity to the instant case is readily apparent, and we consider the rule it states to be controlling. Unlike *Andros*, the title in *Armstrong* was fully contested and at the center of the dispute. As in our case, the Secretary in *Armstrong* claimed that the plaintiff was occupying public land owned by the United

States and separate from that covered by the patent based on the original survey. We held that it was the task of the district court to determine from the evidence whether the land occupied by plaintiff was a part of the land entered by the claimed patentee and described in the patent originally issued to him. If this were determined adversely to plaintiff, then the apparent title would be in the United States and the action would be one against the United States without its consent and, consequently, jurisdictionally barred by sovereign immunity. *Id.* at 41. We there concluded that the district court should make a factual determination of whether the case was controlled by *Malone* (title in the United States, immunity) or *Andros* (title in plaintiff, no immunity) by deciding wherein apparent title rested.

Armstrong recognizes that in title dispute cases the issue of sovereign immunity and the ultimate merits of a plaintiff's claim are intimately interconnected. For all practical purposes, the former cannot be resolved without determining the latter. In the instant case, we hold, as explained in detail below, that the district court erred in its factual and legal determination that the disputed islands were included within the boundaries of the patent to appellee's predecessor. Accordingly, it also erred in its dependent conclusion that the suit was not barred by sovereign immunity.

THE CHOICE OF LAW ISSUE

Although appellee contends to the contrary, the rule is clear that federal law governs as to the construction of a patent and the quantum of the premises

which it conveys. *Hughes v. Washington*, 389 U.S. 290 (1967); *United States v. Oregon*, 295 U.S. 1 (1935). This rule was stated thusly in *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935):

> "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed . . . , is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law."

See also Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 320-21 (1973); *United States v. Schwarz*, 460 F.2d 1365 (CA7 1972); *United States v. Boyd*, 458 F.2d 1252 (CA6 1972). The same rule applies to a patent granted after statehood is achieved. *United States v. Severson*, 447 F.2d 631 (CA7 1971). Accordingly, Federal—not Idaho—substantive law governs us in determining the boundary issue and the extent of the patent.

THE APPLICABLE RULES OF LAW IN THE BOUNDARY ISSUE

Of great importance in this case is the legal effect to be given to the survey's meander line on the river's east bank. Early decisions held that a meander line is generally not to be used as the strict boundary of a tract, but is to be employed in defining the sinuosities of the banks of the stream and as a means of ascertaining the quantity of land in a fraction for sale and the

amount to be paid. *Whitaker v. McBride*, 197 U.S. 510 (1905); *Railroad Company v. Schurmeir*, 74 U.S. (7 Wall.) 272 (1868); *Thomas B. Bishop Co. v. Santa Barbara County*, 96 F.2d 198 (CA9 1938), *cert. denied* 305 U.S. 623. However, the boundary uses of a meander line in special circumstances were expanded and clarified in *Niles v. Cedar Point Club*, 175 U.S. 300 (1899). That case involved lakefront property and a disputed marsh outside the meander line, but arguably still within the boundary. The Court, while noting that a meander line is ordinarily not strictly a line of boundary, found special circumstances which dictated otherwise. The surveyor had stopped his survey at what he called a "marsh," which was excluded from the official plat. The Court held that while the surveyor may have erred in not extending the survey, ". . . his error does not enlarge the title conveyed by the patents to the surveyed fractional sections." *Id.* at 306. It was clear from the circumstances that the government did not intend to convey any property beyond the meander line.

The "special circumstances" exception was restated in *Producers Oil Co. v. Hanzen*, 238 U.S. 325, 339 (1915):

> "[F]acts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse [meander] lines they must be treated as definite boundaries."[1]

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[1] **See also United States v. 100 Acres of Land, Etc., Marin County, Cal., 468 F.2d 1261, 1264 n.1 (CA9 1972), cert. denied 414 U.S. 822 (1973), stating that ". . . a meander line does not delimit a grant where the land is bordered by water unless special evidence is presented to show an intent to use the meander line as a boundary of the patented land. . . ." [Emphasis in original.]**

Other cases considering the "special circumstances" exception and rejecting it on factual grounds include *United States v. Lane*, 260 U.S. 662 (1925), and *Thomas B. Bishop Co. v. Santa Barbara County, supra.* *Lane*, upon which appellee heavily relies, is readily distinguishable. There, the plat mentioned in the patent represented the lake as the boundary. The Court emphasized that the survey, taken as a whole, with the exception of two large tracts, followed fairly accurately the contour of the lake. It went on to say that the evident purpose of the survey was to include in it all the land to the water's edge. The water's edge in *Lane* included the disputed area. Here, the water's edge excludes the islands. *Lane* thereby favors appellants, rather than appellee.

Additionally, *Lane* mentions certain factors which indicated an intention to include extra land within the boundary. Noting an absence of fraud or palpable mistake, it added that at the time of the survey the land had little value, was in a wild and remote area, and presented difficulties in surveying which would outweigh the expenditure of time and money for a more precise rendition. 260 U.S. at 665.

These factors were reiterated in *Thomas B. Bishop Co. v. Santa Barbara County*, supra, a case involving the seaward projection of a sandspit beyond the survey's meander lines. The previously mentioned factors of relative size, value, terrain difficulty, and the lack of fraud were found to be sufficient to overlook the placement

of the meander line and to include the sandpit within the original patent.

It should be emphasized at this point that these are all merely *factors* to be considered in evaluating the weight to be given to the position of a meander line *vis-a-vis* the boundary. Factual circumstances differ from case to case, and *all* the facts must be first considered individually, and then considered *in their totality*.

We now turn to the leading case of *Scott v. Lattig*, 227 U.S. 229 (1913). Aside from the size of the island and its distance from the bank, *Scott* is almost directly in point. It also involved disputed title to an island in the Snake River. The land had been surveyed in 1868, and the surveyor's field notes and the official plat placed the meander line, as here, on the edge of the fractional sections. However, the island was mentioned in neither the field notes nor the plat. Even though it was the duty of the surveyor in *Scott* to note and locate the island's presence, and even though the evidence showed that it had existed at that time, he failed to do so. The island was clearly outside the meander line and between the fractional lots and the thread of the stream. Nevertheless, ". . . the error in omitting it from the survey did not divest the United States of the title or interpose any obstacle to surveying it at a later time." *Id.* at 241-42. The Court found the island's omission and the fact that it had been fast, dry land at the time of the survey and sufficiently separated from the shore, to be the type of circumstances which would warrant the meander line becoming a strict boundary. We find *Scott v. Lattig*

to be directly applicable to our case, both for its legal statements and for its factual similarity.[2]

Just as in *Scott v. Lattig*, the original surveyor in the instant case was specifically instructed to note the existence of any islands. Manual of Surveying Instructions for the Survey of the Public Lands of the United States and Private Land Claims, p. 34 (1890). Also, the governing statute demanded accuracy, with departure therefrom ". . . no further than such particular circumstances require." U.S. Rev. Stat. § 2395 (1) (2d ed.). Here, there is no evidence or claim of fraud. The record is clear that the islands in dispute did, in fact, exist at the time of the 1893 survey. There is no evidence to the contrary.

In determining boundaries in any land patent case, special weight must be given to the precise description of the land contained in the surveyor's field notes and the official plat, *Jeems Bayou Club v. United States*, 260 U.S. 561, 564 (1923). One of the purposes for accuracy in field surveying and platting of uncharted lands was to assure preciseness in descriptions in land patents.[3] It is undisputed that the 1896 patent was

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[2] The principle enunciated in Scott v. Lattig was most recently restated in Texas v. Louisiana, 410 U.S. 702, 713 (1973): "Title to islands [in navigable waterways] remains in the United States, unless expressly granted along with the stream bed or otherwise. This was the express holding of Scott v. Lattig. . . ." See also United States v. Severson, supra.

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[3] The dependence of government land sales on the accuracy of official surveys and plats prepared therefrom is contained in U.S. Rev. State. §2395 (2d ed.), governing the rules of survey, in effect at the time of the 1893 survey.

based on the results of the 1893 survey and the 1895 plat. Accordingly, we must give great weight to the fractional lots' boundary line as revealed in the survey and as shown in the plat.[4]

For the same reason, particular attention must be paid to the precise acreage computation in the plat. In *United States v. Boyd, supra,* at 1254, the plat stated that the premises contained 29.50 acres, and the Court noted that "[i]t did not say more or less." The plat's limitation was taken to show that the patent conveyed only 29.50 acres, which ended at the lake's edge and thus could not include any outside land. Also, in *Scott v. Lattig, supra,* at 240, the fractional sections were described as containing a specified number of acres from which the disputed island was excepted.

Here, the patent and accompanying plat granted appellee's predecessor an exact number of acres in Lots 5 and 8. This evidence is highly persuasive in determining whether the islands were intended to be conveyed therewith.[5]

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[4] **See also United States v. Boyd, supra.** The Court in **First Nat'l. Bank of Decatur, Neb. v. United States,** 59 F.2d 367 (CA 8 1932). referring to plat and survey incorporation into the patent, held that "[t]he government survey creates and does not merely identify sections, subdivisions, and boundaries, and this survey,. the government plat, and the government patent are not open to challenge by collateral attack." [Citing **Russell v. Maxwell Land Grant Co.,** 158 U.S. 253 (1895), and **Cragin v. Powell,** 128 U.S. 691 (1888)].

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[5] "Each section or subdivision of section, the contents whereof have been returned by the surveyor-general, shall be held and considered the exact quantity expressed in such return. . . ." U.S. Rev. Stat. § 2396 (3) (2d ed.).

In summary, there are a number of legal principles and the admitted facts which we must take into consideration in determining the disputed shoreline boundary in the present case—the placement of the meander line and any attendant circumstances showing it to be intended as the strict boundary, the precise description of the land in the surveyor's field notes and the plat, and the exact acreage allotment listed. We emphasize again the need to view the factual circumstances *in their totality*. Having stated these controlling rules, we evaluate the district court's factual findings.

THE STANDARD OF REVIEW

As in reviewing any district court's factual findings, we recognize our obligation to view the record in the light most favorable to appellee. *W. S. Shamban & Co. v. Commerce & Industry Ins. Co.,* 475 F.2d 34 (CA9 1973). We are, of course, guided by the "clearly erroneous" standard of Rule 52 (a), FRCivP, as construed in *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948), where it is said:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." [Emphasis supplied.]

See also *County of Ventura v. Blackburn,* 362 F.2d 515 (CA9 1966).

We may regard a finding as clearly erroneous not only if it is without adequate evidentiary support, but

also if it was induced by an erroneous view of the law. *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194-95 n. 9 (1963); *Rowe v. General Motors Corp.*, 457 F.2d 348 (CA5 1972). Therefore, if we conclude that the district court derived its factual findings and ultimate conclusions of law from the application of improper legal standards to the facts, we must reverse. Specifically, this must occur here if it is apparent that the district court ignored or gave insufficient weight to the important rules and factors detailed above for settling fractional boundary disputes. Also, we naturally must reverse if the admitted facts are overlooked or misinterpreted.

ANALYSIS OF THE DISTRICT COURT'S FINDINGS OF FACT

We must take immediate issue with the district court's finding (Number 8) that "[t]he meander line of the Snake River in 1893, at the time of the survey of Lots 5 and 8 was on the west boundary of the subject lands." The surveyor's field notes give sufficient detail of the meander line of Lots 5 and 8 to place it clearly to the east of any islands in the river at that point. The notes, proceeding south to north, speak of crossing the falls of Sand Creek, then bearing *east*, reaching a rocky point, and finally crossing *another* branch of Sand Creek. Aerial photographs and plats in evidence clearly indicate that the south branch of Sand Creek exits from Section 17 at a point directly across from the middle of the largest of the three islands, Lot 9. The plat, based on the 1893 field notes, clearly shows that south branch of Sand Creek entering the Snake at the approximate

center of Lot 5. This confluence would be directly east of the approximate center of the large island now known as Lot 9. The north fork of Sand Creek flows into the the river at a point to the north of Lot 9 at a narrowing of the river. When these facts are considered, along with the undisputed fact that the islands were in existence in 1893, it can only be concluded that the original survey placed the meander line along the bank to the east of the islands. These facts alone demonstrate that the trial judge was clearly erroneous in his finding that the channel of the Snake River in 1893 was to the west of the subject islands and that the meander line of the Snake River at that time was on the west boundary of the islands. To find otherwise would have Sand Creek's south fork intersecting Lot 9 and flowing into the river on the west side of the island. Such a finding would nullify the undisputed facts before us.

Having established the proper placement of the meander line, the task remains of assessing its factual significance in relation to the omitted islands. We commence by noting again that there is no evidence of fraud in the surveyor's failure to note the islands' existence. He did describe a much smaller island west of the meander line in Section 20, but why did he fail to do so in Section 17? He placed a large island-like piece of land in Section 8 squarely east of the right bank's meander line, but why did he not do likewise in Section 17? In all probability, he intended to return and survey the islands at a later date. Here, we must consider the "special circumstances" discussed above in *Niles v. Cedar Point Club*, *Scott v. Lattig*, and *United States v. Lane*.

On first impression, one might excuse the islands' omission due to their relative smallness. However, the small island south in Section 20—less than five acres in size—was included in the survey, while the three disputed islands—with the largest being almost nine acres—were excluded. The inconsistency is apparent. The surveyor could hardly have considered them too small. Accordingly, we find the islands' relative overall size to be that which might call for their exclusion from the boundary of Section 17 and their reservation for a later survey. *Scott v. Lattig, supra*, at 241-42. While not determinative in itself, this is a major factor which must be considered.

Lane, supra, at 664, also speaks of the omitted land's locality, remoteness, and value as additional factors, along with the existence of any difficulties out of proportion to any possible gains in surveying, as factors which might excuse the island's survey while including them within the fractional lots. These factors do not appear to be applicable here. At the time of the survey, as mentioned in the field notes, the areas along the river were already being settled including Section 17 by Polina Lewis and others. By appellee's own admission, the islands were continuously used for agricultural purposes, principally as grazing land, even at the time of the 1893 survey, so they could hardly have been of such slight value as to be taken for granted. There is no evidence to indicate that the islands were so wild, remote, and dangerous that the surveyor intended implicitly to include them within Lots 5 and 8 without even mentioning them, much less surveying them.

We must also recognize the precise description of Section 17 contained in the plat, realizing the importance of the plat and its field notes in limiting the amount of the patent. *Jeems Bayou Club v. United States, supra; United States v. Boyd, supra.* Physically, the plat is persuasive in showing a noticeable widening of the river at the exact spot where the island *should* be, and a clearly defined meander line to what *would* be their east. Again, the contrast with the small island included in Section 20 is apparent. Mathematically, the plat is persuasive in precisely limiting Lots 5 and 8 to 16.80 and 33.60 acres respectively, computations which coincide with the latest approximation of their sizes. The three islands, now estimated to be 11.12 acres *in toto*, were clearly present in 1893, but obviously could not have been part of the previously delimited 16.80 and 33.60 acres in Lots 5 and 8. The patent conveyed a set number of acres—no more and no less.

The district court placed great reliance upon expert testimony concerning the manner in which the islands were formed. The court concluded that the islands were once morphologically attached to the bank as a peninsula, which gradually became dissected from the bank through the action of the "copious springs flowing from the adjacent basalt cliffs." This may be true, but it is irrelevant in the face of the uncontroverted evidence that the islands did, in fact, exist at the time of the 1893 survey. How they came into existence and how long before 1893 does not overcome the fact that in that year they were fully separated from the river bank and west of the meander line on the east side of the Snake.

CONCLUSION

Considering all the above circumstances in their totality and viewing the record as a whole, we are led to the conclusion that the district court was clearly erroneous in its finding of fact that the islands were intended to be included in the patents conveying Lots 5 and 8. The district court also erred in its conclusion of law that the patent, through mesne conveyances, conveyed the islands to appellee. Title to the islands was and remains in the United States.

It follows that the district court also erred in concluding that this is an action to restrain appellants from interfering with appellee's use and possession of lands patented and lawfully conveyed to him, over which it would have jursidiction.

The decision of the Secretary of the Interior under the Color of Title Act is affirmed. The judgment of the district court is reversed and appellee's action for an injunction is dismissed.

IT IS SO ORDERED.

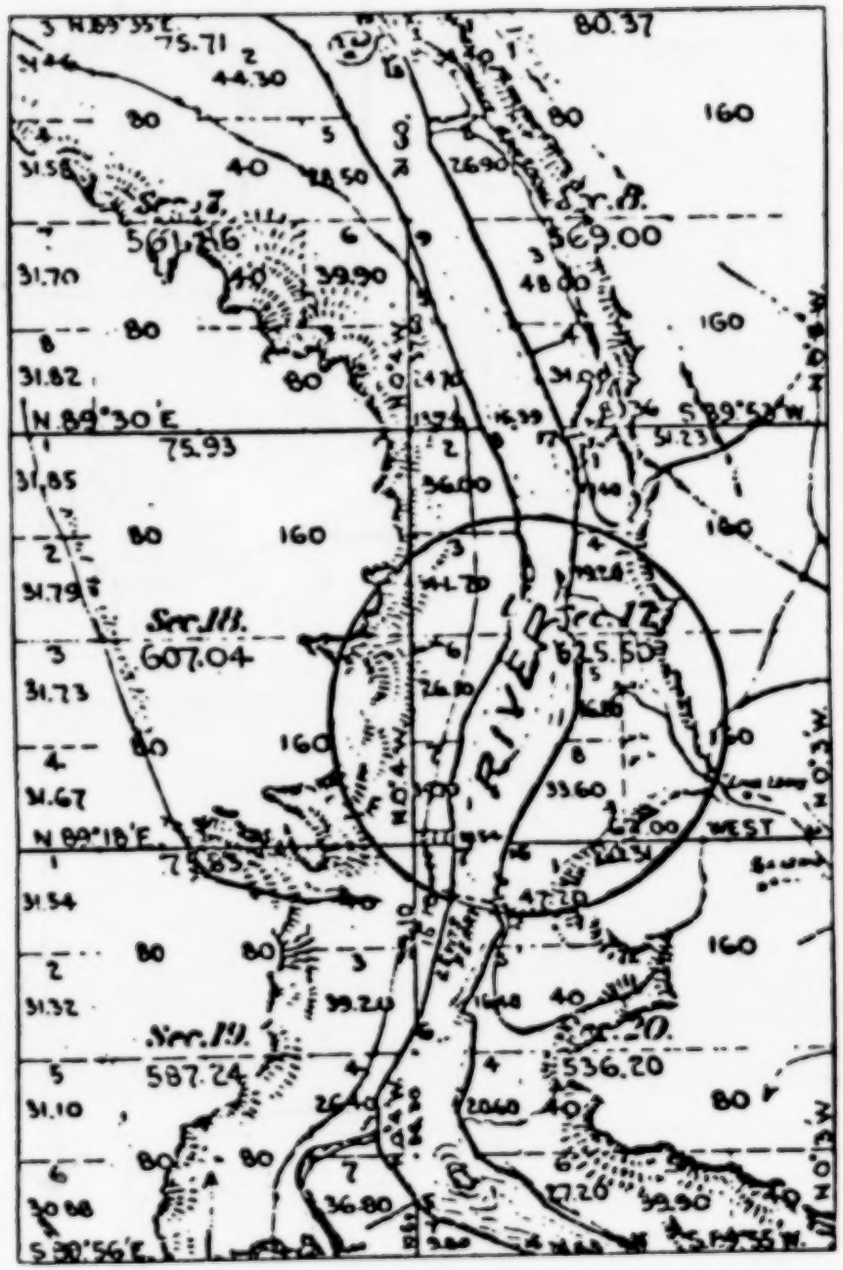

Diagram A
[Plat of 1895]

[Circle denotes area of disputed islands.]

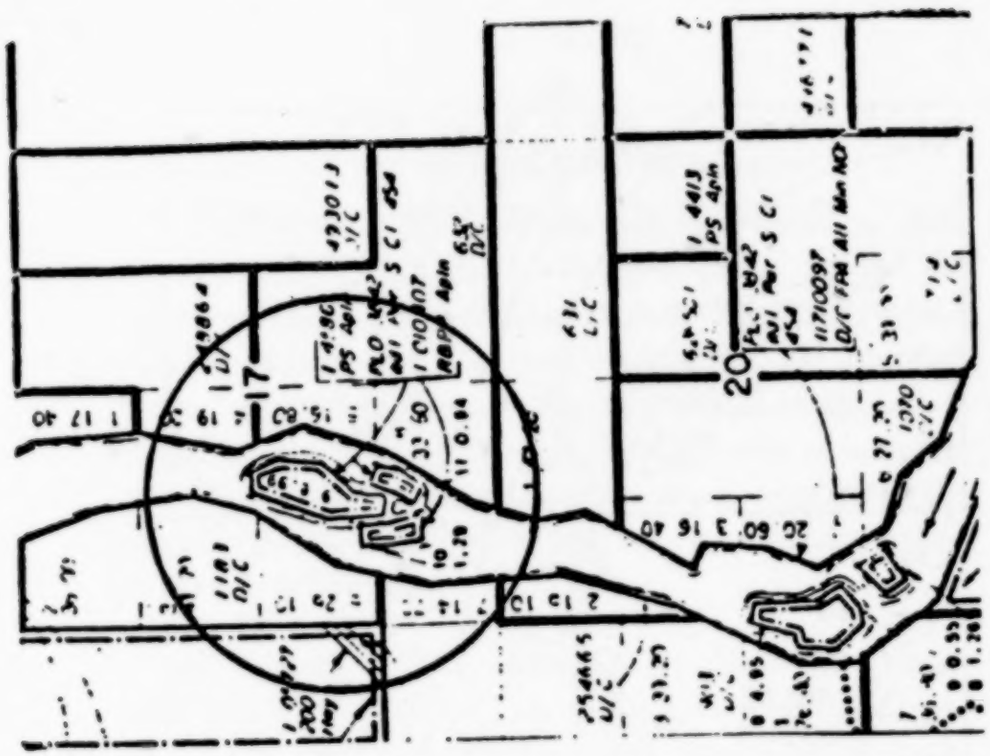

Diagram C
[Plat current to 1971]
[Circle denotes area of disputed islands.]

Diagram B
[Plat of 1959]

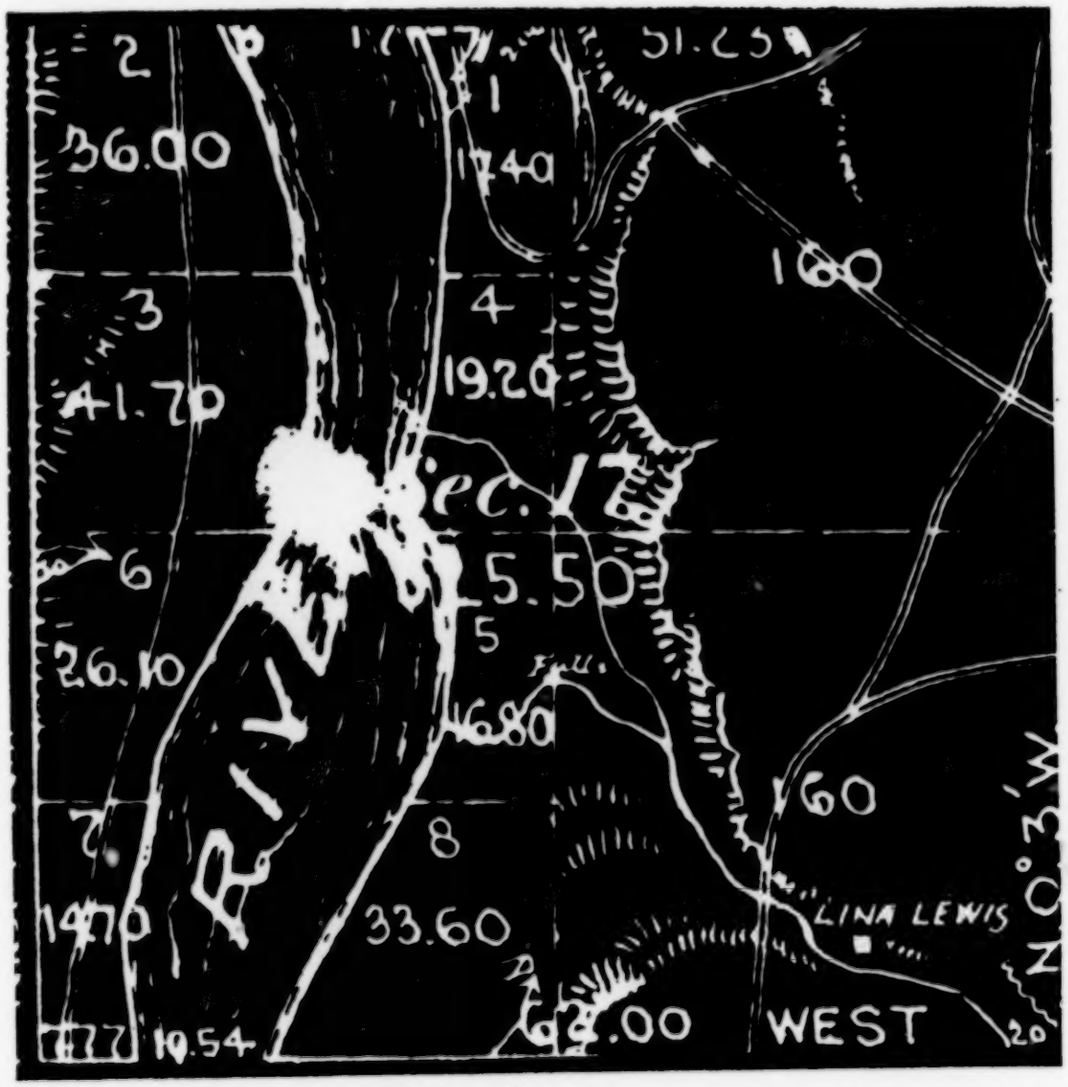

Diagram A-1
[Enlargement of Section 17 showing confluence of Sand (Springs) Creek and Snake River, 1895 Plat]

APPENDIX B

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

WILLIS W. RITTER,
Plaintiff,

v.

ROGERS C. B. MORTON, Secretary of the Department of the Interior,

WILLIAM L. MATHEWS, Idaho State Director, Bureau of Land Management, and RICHARD H. PETRIE, successor to ORVAL G. HADLEY, Manager, Idaho Land Office, Bureau of Land Management,
Defendants.

Civil No. 1-70-74

JUDGMENT and DECREE

This case was heard by the Court, sitting without a jury. Oral and documentary evidence was admitted and briefs filed. The Court having considered the evidence, the briefs and the argument of counsel, and having entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants, Rogers C. B. Morton, Secretary of the Interior, William L. Mathews,

Idaho State Director of the Bureau of Land Management, and Richard H. Petrie, successor to Orval G. Hadley, Manager, Idaho Land Office, Bureau of Land Management, their agents, servants and employees, and all persons in active concert and participation with them, are acting unlawfully and unconstitutionally in an attempt to deprive plaintiff of the use and possession of his lands, more particularly described as Lots 9, 10 and 11, Township 8 South, Range 14 East, Boise Meridian, and that such defendants, their agents, servants and employees, and all persons in active concert and participation with them should be and hereby are permanently enjoined from any attempt to intermeddle with said lands to seize them, to sell or convey them, or in any manner whatsoever to interfere with the peaceable possession and enjoyment of said lands by the plaintiff, Willis W. Ritter, his heirs, assigns and successors in interest.

/s/ Ray McNichols
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WILLIS W. RITTER,
Plaintiff,

v.

ROGERS C. B. MORTON, Secretary of the Department of the Interior, WILLIAM L. MATHEWS, Idaho State Director, Bureau of Land Management, and RICHARD H. PETRIE, successor to ORVAL G. HADLEY, Manager, Idaho Land Office, Bureau of Land Management,
Defendants.

Civil No. 1-70-74

This case was heard by the Court, sitting without a jury. Oral and documentary evidence was admitted and pretrial and post-trial briefs submitted. The matter stands ready for final determination on the merits. The Court, after a consideration of all of the evidence and a fuller view of the applicable law, makes the following Findings of Fact and Conclusions of Law.

PRELIMINARY STATEMENT

This is an action seeking to settle disputed rights regarding certain real property located in the State of Idaho. In Count I of his complaint, plaintiff seeks by review of agency action to have the Court determine

that the plaintiff was the owner of the property involved under the provisions of the Color of Title Act. The second and third Counts seek to restrain the Secretary and his agents from interfering with the plaintiff's title and possession of the lands which title is being claimed by way of patent from the United States of America, and mesne conveyances to the plaintiff.

FINDINGS OF FACT

1. In August, 1893, Township 8 South, Range 14 East of the Boise Meridian, was surveyed, and the plat of survey was approved by the Surveyor General for Idaho on May 18, 1895. Lots 5 and 8 of Section 17 therein were described, containing 16.80 and 33.60 acres, respectively. The field notes and survey plat described the western boundary of Lots 5 and 8, Section 17, as the meander line of the Snake River.

2. On February 26, 1896, the United States issued a patent to Lots 5 and 8. Through mesne conveyances, plaintiff is the present owner of Lots 5 and 8.

3. The lands in dispute in this litigation (referred to herein as the "subject lands"), are sometimes described as three small islands lying adjacent on the west to Lots 5 and 8. These lands were first included in a survey made by the United States in 1955 and are in that survey described as Lots 9, 10 and 11 of said Section 17, and contain 8.99 acres, 1.29 acres, and 0.84 acres, respectively.

4. No reference was made in the 1893 survey to

the subject lands, they not being mentioned in the surveyor's field notes nor in the plat of the survey.

5. Plaintiff's predecessors in interest have used the subject lands for various purposes, including the raising of crops and grazing of livestock. At various times fences have been errected and irrigation facilities installed. Such use has been exclusive to the respective owners of Lots 5 and 8.

6. The witness, Dr. Eardley, a well qualified expert, testified at length regarding the formation of the lands in the Snake River Valley in the area of the subject properties. The evidence of Dr. Eardley is undisputed in the record and was very persuasive to the Court. The subject lands, according to Dr. Eardley, constitute a flood plain of the Snake River which plain was built during flood stages by the deposit of layer upon layer of silt and very fine sand which are the common sediments that the Snake River has carried. During flood stages the river overflowed the banks of its channels and floods over the valley bottom. The bottom of the flow slowly decreased and the silt and sand particles settled down in a layer of flood plain silt and sand was deposited. Dr. Eardley was of the opinion that channels cutting across Lots 5 and 8 resulted from the copious springs flowing from the adjacent basalt cliffs which have converged into waterways across the flood plain and the flood plain has been cut in such a manner that certain remnants such as the subject properties have been partially dissected from the mainland.

7. I find that the subject lands once formed a peninsula which was connected with the mainland, now Lots 5 and 8. The subsequent separation of the subject lands from Lots 5 and 8 was due to the flow of Sand Springs Creek and not the action of the Snake River.

8. The channel of the Snake River in 1893 was to the west of the subject lands and the high and low marks of the Snake River are to the west of the subject lands. The meander line of the Snake River in 1893, at the time of the survey of Lots 5 and 8 was on the west boundary of the subject lands.

9. There was no gross error or fraud in connection with the survey of 1893.

10. The plaintiff has claimed ownership and possession of the subject lands and has raised crops thereon since he acquired a deed to Lots 5 and 8, on July 10, 1954.

11. In February of 1970, the Land Office Manager, Bureau of Land Management, Department of the Interior, purported to approve a transfer of the subject lands to the State of Idaho, Department of Fish and Game. In July of 1970, the officers of the Bureau of Land Management took steps to require the plaintiff to cease and desist the use of subject lands and directed that he remove any crops or improvements thereon by September of 1970. Plaintiff began this suit.

CONCLUSIONS OF LAW

1. This is an action to restrain the defendants from interfering with the plaintiff's use and possession of lands patented and lawfully conveyed to him. The Court has jurisdiction.

2. This action is not barred by the doctrine of sovereign immunity.

3. The subject lands are east of the water course of the Snake River which constitutes the actual boundary of the land conveyed by the patent and the lands are therefore included in the patent. Plaintiff is the owner of the subject properties by way of patent from the United States.

4. Plaintiff is entitled to the relief sought under Counts II and III.

5. The Court having found and concluded in connection with Counts II and III that plaintiff has title to Lots 9, 10 and 11, and having determined that the defendants should be enjoined from interfering with that title, it is unnecessary to determine the issues raised by Count I of of the Complaint.

/s/ Ray McNichols

Chief Judge

APPENDIX C

DECISION OF DEPARTMENT OF INTERIOR

NOVEMBER 14, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Land Office
P. O. Box 2237
Boise, Idaho

DECISION

Willis W .Ritter — Color of Title

Application Rejected

A class 1 color-of-title application for the following lands was submitted by Willis W. Ritter on June 24, 1959:

T. 8 S., 14 E.

Sec. 17: Lots 9, 10, 11

By decision dated March 16, 1960, the applicant was required to submit photostat copies of deeds or abstract of title showing the conveyance of title of the lands to the applicant for 20 consecutive years. On April 14, 1960, photostat copies of instruments of conveyance appearing in the Gooding county records, together with a photostat copy of a warranty deed and the original of an affidavit were filed.

The lands applied for are islands in the Snake River which were erroneously omitted from the original survey. These and other islands in the area were surveyed in 1955, in response to two applications for the survey.

The photostat copies of instruments of conveyance show that a patent from the United States was issued to a Polina Lewis on February 25, 1896, for Lots 5, 8, SE¼SE¼, W½SE¼ of Section 17, T. 8 S., R. 14 E. containing 170.40 acres. Lots 5 and 8 are adjacent to the lots applied for. Another patent was issued for adjoining lands in Sec. 20 and 21; however, since these adjoining lands do not have direct bearing on the matter of a claim or color of title of the subject islands there is no reason to further describe them.

On September 12, 1902, the patented lands in Section 17, described above, were conveyed to James S. and William A. Johnson by the following metes and bounds description:

> "A certain tract of land described as follows to wit: Bounded on the South by section line running East and West between Secs. 17 and 20. On the west by Snake River — On the North by the half Sec. line running east and west through center of Section 17 — On the East by the main wall rock said tract of land containing about 40 acres and fractions thereof more or less the same being situated in Lots 5 and 8, Sec. 17, T. 8 S., R. 14 E., B.M."

The remaining instruments of conveyance shows that the above described tract or parcel of land in Lots 5 and 8 was eventually conveyed to the applicant, together with other lands, through a series of different owners. According to the original survey Lot 5 contains 16.80 acres and Lot 8 contains 33.60 acres for a total of 50.40 acres. The applicant now owns 40 acres more or less of these lots.

The deeds specify that the west boundary of the 40 acre tract is the Snake River. This description, cited above, has not varied since the tract was so deeded to the Johnsons on September 12, 1902. There is no mention, whatsoever, of any islands or other lands which were not part of the original survey.

A claim of class 1 is one which has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation. The purpose and intent of the color-of-title act is to provide a legal method whereby a valid title to a tract of public land may be acquired by a citizen, who, relying in good faith upon a title or claim of title derived from some source other than the government, has been in peaceful adverse possession of the tract for the prescribed period. ***Ralph Findlay,*** A-23522 (February 23, 1943). The basic element of the claim to the public land must be his possession of it under a color-of-title from a source other than the United States. ***John Johnson,*** A-25695 (December 30, 1959). The mere possession of and claim to public land, and the placing of improvements on the land or cultivating the land are not enough in the

absence of color-of-title required by the statue. Occupation of the land must be founded on some reasonable basis of belief that the land was held in good faith under a valid claim ***Marion M. Pontius***, A-27473 (November 7, 1957).

The occupancy and use of the islands under a mistaken belief that it comprised a part of the lands purchased does not entitle the applicant to purchase the land under the Color of Title Act. ***Ephraim R. Nelson***, A-25865, (June 6, 1950); ***Hazel W. Baley***, A-25793 (February 2, 1950); ***John Johnson***, A-25695, (December 30, 1959).

The conveyances of title submitted fail to show that any conveyance of the subject islands has ever been made to the applicant or his predecessors in interest. The instruments show that he owns adjacent lands only. A claim or color of title must be established by a deed or other instrument which purports to pass title and which appears to be title to the land, but is not good title. The applicant shows the title passed to the patented lands but no mention of the subject islands was made at all. An affidavit from the previous owner of the lands now owned by the applicant states that she had the understanding that the islands were an incidence to the acquisition and ownership of the purchased lands. However, as pointed out previously, this is no basis for a claim or color of title under the Color-of-Title Act. No deed or instrument has been submitted which would even so indicate.

The applicant has not submitted any evidence on

which a claim or color-of-title can be based. Therefore, the subject application is hereby rejected for the reasons enumerated above.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. If an appeal is taken, there must be strict compliance with the regulation in 43 CFR, Part 221. (*See enclosed form* 4-1364). A filing fee of $5.00 will be required.

Donald I. Bailey
Manager

APPENDIX D

DECISION OF THE DEPARTMENT OF INTERIOR

August 7, 1961

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

August 7, 1961

Certified Mail
Return Receipt Requested

DECISION

Myrtle A. Freer
Andrew J. Freer, Jr. — Color of Title
Willis W. Ritter
John E. Gurley

Decisions Affirmed

The above-named appellants have appealed from separate decisions[1] rejecting their respective applications to purchase tracts under the Color of Title Act, as amended (43 U.S.C. 1958 ed., 1068 et seq.). The applications were rejected on the basis that the applicants were not misled as to the nature of the grantor's claim to the land by the deeds which were claimed to initiate

[1] The decision relating to the Michigan cases is dated December 2, 1960, and the decisions relating to the Idaho and Nevada cases are dated November 14 and July 28, 1960, respectively.

the color of title, or that the applicants have not submitted evidence of any written instrument purporting to convey title to the lands 20 or more years previously.

While Mrs. Freer and her husband were occupying certain public land, a local court in 1938 determined that Mr. Freer, Sr., qualified as a resident of Millen township for the purpose of serving in the office of township supervisor by reason of the years he had lived on the land in issue. Mr. and Mrs. Freer, Sr., misconstrued this court decree to be a determination that Mr. Freer, Sr., was the owner of the land in issue, so in 1938 he deeded the portion Mrs. Freer now seeks to purchase to her and in 1945 he deeded the portion their son, Andrew J .Freer, Jr., seeks to him. Thus, the Freers' claims of color of title are based on the fact that they misconstrued the law, not that they were misled by the terms of the mentioned deeds of conveyance or court decree. Moreover, Mr. Freer, Jr., has not held the land 20 years since the execution of the deed naming him grantee.

Judge Ritter, as the owner of nearby mainland, believed that he was the riparian owner of certain islands in issue, and he occupied the lands under this belief. The Department has determined that the islands were in existence prior to the admission of the State of Idaho into the Union, so the islands are public land. See *Willis W. Ritter*, A-27755 December 22, 1958). Thus, in effect, the appellant asserts that his belief that he was the riparian owner of the islands, and his occupancy of the lands under this belief, is sufficient to give him a preference right of purchase under the Color of Title

Act, *supra*, even though he has no instrument which purports to convey title to the public lands to him or his predecessors in interest.

Mr. Gurley purchased land adjoining the public land he seeks under the belief that the land description in his deed included the public land in issue. Thus, Mr. Gurley's mistake was one as to the boundaries of his land, and his claim is not based upon any written instrument which purports to convey title to the public land in issue.

The accepted weight of authority in the absence of statute is that color of title can be founded only upon an instrument in writing. *Peterson v. Weber County*, 103 P. 2d 652, 655; 99 Utah 281 (1939). The purpose of the Color of Title Act, *supra*, is to provide a legal method whereby one who, relying in good faith upon a title or claim of title derived from some source other than the Government, has been in peaceful, adverse possession of a tract of public land for the period prescribed by the statute, and who meets the other requirements of statute and regulation, may acquire a valid title to the land. See Vol. 2, 1953 U.S. Code Cong. and Adm. News, page 2014 *et seq*. The mere occupancy of the land, or occupancy under a claim of title which the claimants knew or had good reason to believe was invalid, is not sufficient, even when the other requirements of the act may have been complied with. *Jose C. Crespin v. Thelma D. Sloan*, A-25520 (November 16, 1949). The appellants have offered no showing which would support a finding that they or their predecessors had

reason to believe they had title to such land derived from a source other than the Government.

Accordingly, the decisions are affirmed.

Mrs. Myrtle A. Freer, Mr. Andrew J. Freer, Jr., Judge Willis W. Ritter and Mr. John E. Gurley are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be computed on the basis of $5.00 for *each* color of title application included in the appeal. If each appellant adversely affected by this decision appeals, the total filing fee is $20.00. In taking an appeal there must be strict compliance with the regulations.

/s/ John B. Piccolo
Acting Chief,
Division of Appeals

Enclosure

DISTRIBUTION

Mr. Glenn C. Hague, Attorney for Mrs. Freer and Mr. Freer, Jr. (Certified Mail)

Mrs. Myrtle A. Freer (Regular Mail)

Mr. Andrew J. Freer, Jr. (Regular Mail)

Senior & Senior, Attorneys for Judge Ritter (Certified Mail)

Hon. Willis W. Ritter (Regular Mail)

Mr. Glenn B. Gurley, Attorney in fact for Mr. John E. Gurley (Certified Mail)

Mr. John E. Gurley (Regular Mail)

Chief, Div. of Field Services

SD (Idaho)

SD (Nevada)

Land Office, St. Paul, Minnesota

LO (Boise)

LO (Reno)

Chief, Div. of Lands and Recreation

Each Case File

Permanent File

Attorneys' Reading File

Appeals Reading File

JHO'D

APPENDIX E

DECISION OF DEPARTMENT OF INTERIOR

April 2, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF SECRETARY

Washington 25, D.C.

A-29221

Myrtle A. Freer	BLM 051854 (Michigan)
Andrew J. Freer, Jr.	BLM 051863 (Michigan)
Willis W .Ritter	Idaho 010584

Color of title applications rejected

Affirmed

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Myrtie A. Freer, Andrew J. Freer, Jr., and Willis W. Ritter have separately appealed to the Secretary of the Interior from a decision dated August 7, 1961, whereby the Division of Appeals, Bureau of Land Management, affirmed land office decisions rejecting their respective applications to purchase tracts under the Color of Title Act, as amended (43 U.S.C., 1958 ed., sec. 1068 *et seq.*).

The applications were filed as class 1 claims under the act. Class 1 claims are allowable only where it is

shown to the satisfaction of the Secretary of the Interior

> "that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation * * *." 43 U.S.C., 1958 ed., sec. 1068.

The claim of Mrs. Freer originated in a deed issued on March 20, 1936, by her husband, Andrew J. Freer, Sr., purporting to convey a two-thirds interest in a certain island to her. Andrew J. Freer, Jr.'s, claim originated in a deed issued on October 30, 1945, by his father, Andrew J. Freer, Sr., purporting to convey a one-third interest in the same island to him. There is evidence that Mrs. Freer and her husband did build a house and reside on the island as early as 1917. There is, however, no evidence at all of any purported conveyance of the island to Andrew J. Freer, Sr. In fact, there is not even an assertion that prior to the conveyances made by him he thought he owned the island, or any explanation as to why he might have thought he owned the island. Clearly, therefore, a basic requirement of the color of title act, that the claimant must have possessed the land under claim or color of title, is completely lacking so far as Freer, Sr., is concerned. *Marion M. Pontius*, A-27473 (November 7, 1957). Mrs. Freer and Freer, Jr., acquired color of title in 1936 and 1945, respectively, but Mrs. Freer was cognizant in 1954 that she did not have title to the land.

Andrew J. Freer, Jr., was also aware in 1954 that he did not have title to the land. Their holding of the land thereafter cannot be said to have been in good faith under claim or color of title, *Marion F. Pontius, supra,* and their holding prior thereto was not for the required twenty years. The Freer color of title applications were therefore properly rejected.

Appellant Ritter's application is for three islands in the Snake River, Idaho, surveyed as lots 9, 10, and 11, sec. 17, T. 8 S., R. 14 E., B.M., Idaho, in response to applications for survey filed in April 1955. The appellant's application is based upon his and his predecessors' ownership of land on the east bank of the Snake River lying opposite the islands (lots 5 and 8, sec. 17). Lots 5 and 8 were patented by the United States on February 25, 1896. On September 12, 1902, the lots were included in a conveyance which described the lands conveyed by metes and bounds, the west boundary being described as the Snake River. This description did not vary in subsequent conveyances, including the final one to appellant executed on July 10, 1954. Appellant concedes that in the chain of title commencing with the patent from the United States there is no reference to any islands in the river.

The Bureau rejected Judge Ritter's application on the ground that neither he nor his predecessors had any color of title to the islands, there being no instrument in writing purporting to include the islands.

On this appeal Judge Ritter contends vigorously that he and his predecessors had color of title to the

islands by virtue of the patent from the United States and the subsequent conveyances. His contention is based on the argument that until 1915 the Idaho law was that a riparian owner takes title to the thread of the stream, including all small islands, whether the stream is navigable or non-navigable and that the Idaho law is still the same as to nonnavigable streams. He concludes that the patent and conveyances must be read in light of the Idaho law in existence at the time and that, so read, they constitute color of title to the islands.

It is unnecessary to determine here whether a general interpretation of law as to the effect of a conveyance satisfies the statutory requirement for a showing of a color of title. Assuming that it does, it would not help the appellant here. The patent from the United States to lots 5 and 8, section 17, was issued on February 25, 1896. The first decision by the Idaho Supreme Court holding that a patentee of riparian land gained title to an island lying between his land and the thread of the stream was *Johnson v. Johnson*, 95 Pac. 499, decided March 23, 1908. The case was one of first impression (see page 503). It is hard to see how the patent issued in 1896 and the conveyance made in 1902 could be said to have been made with this ruling in mind.

But this does not matter. Assuming that they were, the fact is that on February 6, 1915, the Idaho court in *Callahan v. Price*, 146 Pac. 732, cited by appellant, overruled *Johnson v. Johnson* and held that a riparian owner did not gain title to an island lying between his riparian land and the thread of a navigable stream. This ruling came down shortly before the lapse of 19 years

after issuance of the patent. Thereafter, appellant's predecessor then holding title to lots 5 and 8 had no basis for believing that his ownership of those lots entitled him to ownership of the three islands lying opposite them. In other words, there could be no good faith holding of the islands under claim or color of title subsequent to February 6, 1915. And, since any previous good faith holding in reliance upon the prior interpretation of Idaho law was far less than 20 years, a basic requirement of the color of title law has not been and cannot be fulfilled.

The appellant has not addressed himself to this point. He has, however, said that the navigability of the Snake River has never been determined at this point where the three islands are located. He has also said that *Callahan v. Price* did not change the Idaho law as to nonnavigable streams. However, in *Willis W. Ritter et al.*, A-27755 (December 22, 1958), in which the Department affirmed the dismissal of his protest against the survey of the same three islands, the Department accepted determinations by the courts and this Department that the Snake River is navigable. Among other decisions, the Department cited *Johnson v. Johnson, supra*, in which the Idaho court was concerned with the ownership of an island in the Snake River perhaps five miles or so from the three islands in question. Discussing the question of what constitutes a navigable river, the court concluded that the Snake River is a navigable stream . 95 Pac. at 507. As was the case in 1958, we see no reason to hold that the river is not navigable where the three islands are located. Therefore, we would be

unable to accept any contention that the river is non-navigable where the islands are located and that the appellant and his predecessors continued to have color of title despite *Callahan v. Price*.

Callahan v. Price was the result of the decision of the United States Supreme Court in *Scott v. Lattig*, 227 U.S. 229 (1913), which reversed a decision of the Idaho court following the rule in *Johnson v. Johnson*. The United States Supreme Court held that an island in the Snake River which was in existence at the time Idaho was admitted to the Union but which had not been surveyed did not pass with a patent to land on the bank of the river and remained public land of the United States. Appellant argues that the islands involved in *Scott v. Lattig* and in *Callahan v. Price* are much different from the three islands involved here from the standpoint of size and their separation from the shore. If the distinction is sound, the only legal significance of it would be that it would be necessary to conclude that title to the three islands passed from the United States with the issuance of the patent to lots 5 and 8 in 1896, and we would be left with no color of title case at all. So, too, is the effect of appellant's argument that until *Callahan v. Price*, his predecessors actually had legal title to the islands. In any event, in the Department's decision of December 22, 1958, dismissing appellant's protest against the survey of the islands, the Department held that title of the islands is in the United States. The appellant cannot attack that conclusion and still maintain his application.

It is unnecessary to discuss at length appellant's contention that the color of title act does not require a claimant to have color of title in all cases but permits him to comply if he has merely "claim of title" as distinguished from "color of title". In this case, any claim of title that the appellant and his predecessors have rests upon the interpretation of Idaho law prior to *Callahan v. Price*. Such claim of title could not have been held in good faith after that decision was issued.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210. 2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decision appealed from is affirmed.

Ernest F. Hom
Assistant Solicitor
Land Appeals

APPENDIX F

SURVEY OF PUBLIC LANDS

43 USCA §752

§752. Boundaries and contents of public lands; how ascertained

The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:

First. All the corners marked in the surveys, returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half- and quarter-sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where

no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the watercourse, Indian boundary line, or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part. R.S. § 2396; Mar. 3, 1925, c. 462, 43 Stat. 1144 ;1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.

APPENDIX G

LANDS HELD UNDER COLOR OF TITLE

43 USCA §1068

Sec.

1068. Lands held in adverse possession; issuance of patent; reservation of minerals; conflicting claims.

1068a. Appraisal.

1068b. Mineral reservation.

§1068. Lands held in adverse possession; issuance of patent; reservation of minerals; conflicting claims

The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land

upon the payment of not less than $1.25 per acre: *Provided*, That where the area so held is in excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder: *Provided further*, That coal and all other minerals contained therein are hereby reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits: *And provided further*, That no patent shall issue under the provisions of this chapter for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant. Dec. 22, 1928, c. 47, § 1, 45 Stat. 1069; July 28, 1953, c. 254, § 1, 67 Stat. 227.

§1068a. Appraisal

Upon the filing of an application to purchase any lands subject to the operation of this chapter, together with the required proof, the Secretary of the Interior shall cause the lands described in said application to be appraised, said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement of the lands by the applicant or his predecessors in interest, and in such appraisal the Secretary shall consider and give full effect to the equities of any such applicant. Dec. 22, 1928, c. 47, § 2, 45 Stat. 1070.

§1068b. Mineral reservation

If the claimant requests that the patent to be issued under this chapter not contain a mineral reservation and if he can establish to the satisfaction of the Secretary that the requirements of this chapter have been complied with by such claimant and his predecessors for the period commencing not later than January 1, 1901, to the date of application, no mineral reservation shall be made unless the lands are, at the time of issuance of the patent, within a mineral withdrawal or subject to an outstanding mineral lease. Dec. 22, 1928, c. 47, § 3, as added July 28, 1953, c. 254, § 2, 67 Stat. 228.

APPENDIX H

United States Department of the Interior

Bureau Of Land Management
Washington, D.C. 20240

May 7, 1975

Memorandum

To: Assistant Director, Technical Services (400)

From: Chief, Division of Cadastral Survey

Subject: Resurveys and Omitted Land Surveys Along the Snake River, Idaho

On May 6, you asked us to supply certain information pertaining to resurvey and omitted land surveys along the Snake River in Idaho. It is our understanding that this information was requested by Judge Willis Ritter, U.S. District Court for the District of Utah, Salt Lake City, Utah.

Background.

Judge Ritter owns upland the Snake River in T. 8 S., R. 14 E., Boise Meridian, Idaho, and in 1959 laid claim to an alleged tract of land fronting his property under the Color of Title Act. This action

was denied by the Secretary of the Interior. Judge Ritter petitioned that the United States be restrained from interfering with his title, use, and possession of the lands in dispute. The U.S. District Court, District of Idaho, ruled in favor of Judge Ritter, and the decision was appealed by the United States. The U.S. Court of Appeals, Ninth Circuit, reversed the District Court's decision and affirmed the decision of the Secretary of the Interior.

Under the Omitted Land Act of 1962, (Public Law 87-469, 76 Stat. 89), an extensive inventory and survey of omitted lands along approximately 150 miles of river bank of the Snake River was initiated. The resurveys and surveys were concentrated in an area between Blackfoot and St. Anthony, because this area had the greatest history of land title problems caused by the existence of omitted land along the river banks. Approximately 16,000 acres of omitted lands were identified in these resurveys. Judge Ritter's claim lies approximately 100 miles downstream from this area.

Definition of Omitted Lands...

Omitted lands are land areas not shown on the plat of original survey, which were excluded from the survey by some gross discrepancy in the location of the meander line of a body of water. The lands typically lie between the actual waterline of a body of water and the original surveyed meander line.

Specifically, we have been asked to provide the following information:

1. *Number of resurveys and omitted land surveys executed by the Bureau along the Snake River, Idaho.*

   Between 1959 and 1968, approximately 28 contigous townships along the Snake River were resurveyed, and omitted lands in these townships identified. At the present time, five separate protests have been filed against these surveys by landowners along the river bank. Of the cases that have been heard (3), one has been decided in favor of the protestant (*Burt A. Wackerli, et al. v. Rogers C. B. Morton*, Civil No. 1-66-92, USDC, Idaho). The court ruled that there was insufficient land area involved for it to be considered omitted land. An appeal to the Ninth Circuit Court has been recommended by the Bureau in this case.

2. *Number of individual private land owners involved.*

   When the resurveys were completed and omitted land areas identified, approximately 400 parties were notified by the Bureau that omitted lands fronted their lands along the Snake River. Information pertaining to: (1) Number of acres of omitted land classified for retention by the United

States; (2) Number of acres of omitted land classified for sale under the Act of 1962; (3) Number of sales to date; and (4) Amount of money realized from these sales is a function of the Lands Division and is not available in the Division of Cadastral Survey (420).

/s/ BERNARD W. HOSTROP

OCT 20 1975

No. 75-314

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIS W. RITTER, PETITIONER

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-314

WILLIS W. RITTER, PETITIONER

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

Petitioner is the owner of land on the Snake River in Idaho acquired through mesne conveyances deriving from federal patents (Pet. App. A 2a). In the river, parallel to petitioner's land, are three small islands which were not shown in the original surveyor's notes or on the survey plat in connection with petitioner's patent of the riparian property (*id.* at 1a–4a). In 1955 the Department of Interior surveyed the islands and later made known that they were public lands of the United States that the Department intended to convey to the State of Idaho (*id.* at 3a–4a).

595-171—75——1

Petitioner then brought an administrative action under the Color of Title Act, 45 Stat. 1069, as amended, 43 U.S.C. 1068, which permits persons having possessed public land in good faith and under color of title for more than 20 years to receive patents to the land. The Department of Interior found that petitioner did not qualify for a patent under the provisions of the Act (Pet. Apps. C, D and E). Petitioner then brought this action to compel the Secretary of the Interior to patent the islands to him, or alternatively, for the court to quiet his title to the islands (Pet. App. A 2a–4a).

The district court found that the islands were separated from petitioner's land by the flow of a small stream entering the river and not by the main flow of the river, and held that they are part of his patented land (Pet. App. B 1b–7b). The court of appeals reversed in an opinion upon which we rely (Pet. App. A 1a to 20a–3). It held that the case was governed by this Court's decision in *Scott* v. *Lattig,* 227 U.S. 229; and that here, as in *Scott* v. *Lattig,* the absence of reference to the islands in the survey or survey notes, and the exact description of the land patented including its precise acreage but excluding the islands, left no doubt that the islands were not conveyed by the United States to petitioner's predecessors in title (Pet. App. A 12a–15a). The court rejected the district court's finding of fact regarding the location of the islands, and held that the islands were in the main stream of

the river (Pet. App. A 15a to 20a–3). It also affirmed the Secretary's decision under the Color of Title Act (Pet. App. A 20a).

1. The decision of the court of appeals, contrary to petitioner's contention (Pet. 2–3, 24–34), creates no new legal precedent, but merely applies existing law to the facts of this case. The decision in regard to ownership of the islands follows the decision of this Court in *Scott* v. *Lattig, supra,* which involved similar islands in the same river (see Pet. App. A 12a–15a). The essential dispute between the parties concerns issues of fact, which have been thoroughly reviewed by the court of appeals (Pet. App. A 16a–20a) and do not merit further review.

Railroad Co. v. *Schurmeir,* 7 Wall., 272, relied upon by petitioner (Pet. 17–24), is not in conflict with the decision below. In *Schurmeir* the Court held that the actual bank of the Mississippi River, and not a meander line shown on a survey, was the boundary established by the patent in question (7 Wall. at 286). Here the islands in question are beyond the bank of the river. See *Scott* v. *Lattig, supra,* 227 U.S. at 242–243. See also *Texas* v. *Louisiana,* 410 U.S. 702, 713–714.

2. Petitioner's argument (Pet. 34–36) that the Secretary of Interior should have granted him a patent under the Color of Title Act, was also properly rejected by the court of appeals (Pet. App. A 20a). Petitioner's title derives purely from federal patents. No deed in his chain of title purports to grant more

than what was patented (Pet. App. E 3e), and, as indicated above, the islands are not included in his patents. Petitioner essentially seeks title by adverse possession, which is not permitted against the United States. *Utah Power and Light Co.* v. *United States,* 243 U.S. 389.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975